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In The
Supreme Court of the United States

ROBERT PIPER, JR., CASSANDRA PIPER and WENDELL PIPER,

Petitioners,

v.

JACK B. BINION, HORSESHOE ENTERTAINMENT, HORSESHOE GAMING HOLDING CORP. and NEW GAMING CAPITAL PARTNERSHIP,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) The Fifth Circuit Court of Appeals erred in not following the substantive law of Louisiana and the decisions of the highest court in the State of Louisiana.

(2) Certiorari is necessary to correct a conflict in the panel decision in this unpublished opinion case which conflicts with a published decision of another panel in the Fifth Circuit.

(3) Petitioners were denied their constitutional right to have the case reviewed by the Court of Appeals since the unpublished per curium opinion does not constitute an independent *de novo* review as required by federal procedure and this Court.

LIST OF PARTIES

The parties to this case are Robert Piper, Jr., Cassandra Piper, and Wendell Piper (Petitioners); August Robin (co-plaintiff below) and the Respondents, Jack B. Binion, Horseshoe Entertainment, Horseshoe Gaming Holding Corporation, and New Gaming Capital Partnership.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Robert Piper, Jr., Cassandra Piper and Wendell Piper respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals, Fifth Circuit, entered in the above proceeding on March 27, 2008.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, an unpublished opinion was entered on March 27, 2008 and is contained in the Appendix hereto as Appendix 1, *infra.* The denial of a petition for panel rehearing was entered on April 23, 2008 and is attached as Appendix 75.

JURISDICTION

The Court of Appeals, opinion was filed on March 27, 2008 and a panel rehearing was denied on April 23, 2008. Petitioners now invoke the jurisdiction of this court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment X of the Constitution of the United States. Powers Reserved to States or People – "the powers not delegated to the United States by the

Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

28 U.S.C. § 1652. State Laws as Rules of Decision.

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

(June 25, 1948, Ch. 646, § 1, 62 Stat. 944).

28 U.S.C. § 1291. Final Decisions of District Court.

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Island, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in Sections 1292(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION IN COURTS BELOW.

Petitioners, Robert Piper, Jr., Cassandra Piper, and Wendell Piper (hereinafter collectively the Petitioners) and August Robin initially filed suit in state court in July, 2004 against Respondents. The suit alleged claims of fraud and breach of fiduciary duties, rescission, misrepresentation, detrimental reliance and statutory deceptive trade practices. The case was removed to the United States District Court for the Western District of Louisiana on the ground of diversity of citizenship. After several amending petitions, answers, extensive discovery and on the eve of a jury trial, the district court entered an opinion and order granting the motion of Respondents for summary judgment. The district court's opinion is reported at *Robin v. Binion*, 469 F.Supp.2d 375 (W.D. La. 2007). The district court's opinion is also attached as Appendix 9. The appeal to the United States Court of Appeal for the Fifth Circuit was timely and properly lodged, oral argument proceeded in early March, 2008 and the court rendered its brief decision on March 27, 2008. Co-plaintiff and Appellant, August Robin filed a timely petition for panel re-hearing and the re-hearing was denied on April 23, 2008. See Appendix 1 for decision of the Fifth Circuit and Appendix 75 for denial of the petition for re-hearing.

B. STATEMENT OF THE FACTS

On April 20, 1993, the limited partnership, Horseshoe Entertainment, L.P., was formed to own and operate the Horseshoe Casino in Bossier City, Louisiana. The general partner was New Gaming Capital Partnership ("NGCP"), controlled by Jack B. Binion. NGCP owned a 89% interest in Horseshoe Entertainment, L.P. The limited partners of Horseshoe Entertainment, L.P., were Petitioners and Co-Appellant August "Duke" Robin ("Robin") (3%), Wendell Piper, Robert Piper, Jr., and Cassandra Piper (5.08%) ("the Pipers"), and Frank Pernici (2.92%). In return for Robin's, Pernici's, and Robert Piper's assistance in procuring a Louisiana gaming license and developing a casino property, Binion issued the aforementioned limited partnership interests. *Robin*, 469 F.Supp.2d at 378. The Pipers knew that Binion was a successful casino developer and operator, who was reputed to be a man of his word. They learned that Binion's business acumen had a darker side.

The Horseshoe Casino in Bossier City opened for business on July 9, 1994, and was phenomenally successful. The initial distributions to the limited partners, who had been instrumental in the development of the project, reflected that phenomenal success. Once the success of Horseshoe Entertainment became apparent, Binion immediately began to seek to buy out the interests of the limited partners including those of Petitioners. When the limited partners declined to sell, Binion orchestrated a series of actions that were calculated to mislead Petitioners and

fraudulently to deny them various economic benefits to which they were entitled, including quarterly distributions. Binion breached obligations and duties to Petitioners, failed to provide access to information necessary for Petitioners to enjoy the benefits to which they were entitled, intentionally concealed material facts, and failed to disclose material facts about the operation of the business, all of which resulted in a multimillion dollar windfall principally to Binion and to various family trusts established by him.

As part of this fraudulent scheme, Binion improperly mortgaged Horseshoe Entertainment property and secretly used Horseshoe Entertainment assets and opportunities properly belonging to Horseshoe Entertainment, not to benefit Horseshoe Entertainment and its partners but, rather, to benefit other entities (owned and controlled by Binion), such that neither Horseshoe Entertainment nor the limited partners would reap the benefits of such opportunities, despite having to pay for them. The plan to usurp Horseshoe Entertainment opportunities (at Horseshoe Entertainment's expense) included the repeated modification of corporate structures of the Horseshoe Gaming entities such that Horseshoe Entertainment and the Petitioners would be frozen out of new entities being formed to pursue and acquire casinos in other jurisdictions. These corporate structures were fraudulently devised, and the concomitant accounting information hidden and concealed and not disclosed, with the specific intent and

for the primary purpose of excluding Petitioners from such opportunities, even though Horseshoe Entertainment's funds, assets, and credit were used to pursue the opportunities.

Shortly after Horseshoe Entertainment opened the Horseshoe Casino in Bossier City, Binion secretly began diverting millions of dollars in assets and resources from Horseshoe Entertainment to develop a casino project in Tunica, Mississippi, all without the knowledge of the limited partners.

In October 1994, Binion caused Horseshoe Casinos (Indiana), LLC, to be formed to pursue a new casino development in Indiana. In 1996, the State of Indiana declined to approve the application for a riverboat casino license in Harrison County by Horseshoe Casinos (Indiana), LLC. Binion spent substantial corporate resources and corporate-officer time and energies on the Indiana project. Horseshoe Entertainment and the limited partners indirectly paid a proportionate share of those expenses and lost the benefit of the corporate resources so expended, even though the limited partners were frozen out of the opportunity by the corporate structure machinations of Binion.

In mid-1995, Binion caused Horseshoe Ventures, LLC, to be formed to pursue the development of casinos in jurisdictions other than Indiana, including Missouri, West Virginia, Maryland, and Pennsylvania. Binion improperly used assets belonging to Petitioners and Horseshoe Entertainment.

In mid-1995 unbeknownst to the Pipers, Binion caused Horseshoe Gaming, LLC, to be formed for the purpose of acquiring, through a "Roll-Up Transaction," the ownership interest in NGCP and RPG by exchanging ownership interests in Horseshoe Gaming, LLC, for partnership interests in NGCP and RPG. The limited partners in Horseshoe Entertainment were not offered an opportunity to participate in this "Roll-Up Transaction." Horseshoe Gaming, LLC, was in effect a holding company whose only material assets were the ownership interests in the operating subsidiaries of Bossier City and Tunica. Consequently, Horseshoe Gaming, LLC, depended entirely on distributions from assets of Horseshoe Entertainment, or other intercompany transfers of funds from the operating subsidiaries, to pay corporate expenses, debt service, and other obligations. Concurrently with the effectiveness of the Roll-Up Transaction, Respondents entered into financing that limited quarterly distributions to Petitioners.

In September 1998, Horseshoe Gaming, LLC, entered into a merger agreement with Empress Entertainment, Inc., to acquire, subject to regulatory approval, the Empress Casinos in Illinois and Indiana, for approximately $609 million, including the assumption of approximately $150 million of debt. In early 1999, Binion again asked to purchase the Petitioners' interest in Horseshoe Entertainment in order to pursue the Empress acquisition. Binion represented to the limited partners that the company could not pursue the Empress acquisition with his

Louisiana partners. While making material misrepresentations, Binion and others orchestrated yet another sophisticated modification of existing corporate structure (via a merger of Horseshoe Gaming, LLC, into a newly formed Delaware corporation, HGHC) to ensure that Petitioners would be excluded from participation in the new entities being formed to acquire the operating casinos in Illinois and Indiana owned by Empress Entertainment, Inc.

Based in part on Binion's representation that the company could not pursue the Empress acquisition with his Louisiana partners and that the limited partners would participate in the up-side equity appreciation if he sold the company, the Pipers entered into a buyout agreement, dated April 21, 1999, with Binion, Horseshoe Gaming, LLC, Horseshoe Gaming, Inc., Horseshoe Entertainment, and NGCP (the "Binion Group"), pursuant to which, "subject to all necessary regulatory approval," the Binion Group would repurchase the Pipers' ownership interests for approximately $6 million.

The Buyout Agreements were executed by the Petitioners without any disclosure of material facts or knowledge of the fraud scheme set forth herein, which was contrived artificially to devalue the interests of the limited partners and which was deliberately concealed and hidden from the Petitioners herein.

In the Buyout Agreements is the following Participation Clause, or what is sometimes referred to as the most favored nations' clause:

> 7. *Participation in Sale by Binion.* If, within five years of the date of this Agreement, the Binion Family Interests collectively *sells* in excess of a 50% interest in Horseshoe Gaming, LLC, for a purchase price consisting of cash, debt or publicly traded securities or any combination thereof having a value of in excess of $5,350,000 per 1% interest sold, then [the Pipers] shall receive . . . a cash sum equal to 2¼% of the value of the sale in excess of $5,350,000 per . . . 1% sold (such cash sum equal to 2¼% being the "Participation Payment"). For the purposes of this paragraph, the value of the sale shall be equal to (i) the cash purchase price, plus (ii) 80% of the value of the publicly traded securities as determined by the last sales price of such securities at the close of the market upon which such securities are traded, on the date the Binion Family Interests receives such securities, plus (iii) 80% of the present value of the debt. For the purposes of this paragraph, the Binion Family Interests shall mean, Binion or any entities owned or controlled by Binion, or any member of his family or any trust for the benefit of any member of his family. In the event that [the Pipers] are entitled to the Participation Payment, all sums due from [the Pipers] to Horseshoe Companies shall be due

and payable immediately to the extent of the Participation Payment.

The Participation Clause granted to the Pipers an opportunity to participate in the proceeds of the Binion Family's sale of the business upon acceptance by Respondents of a bona fide offer to purchase in excess of 50% of their interest in Horseshoe Gaming, LLC, within five years of the date of the Buyout Agreements, dated April 21, 1999. The Buyout Agreements contained a general release, for which the Pipers were compensated $500,000.

From 1999 the Pipers continued to support Binion and he continued to express to them his appreciation for their many years of support and his commitment to buy out the most favored nations' provision of their sale agreement. In September 2003, the sale of Horseshoe Casino to Harrah's was announced for a price of $1.45 billion, and Binion indicated to Robert Piper, Jr. that he would honor his commitment to buy out Petitioners' most favored nations' clause. In connection with this commitment, approximately $90 million was subsequently escrowed from the Harrah's sale, in part to satisfy the obligation due to the Pipers.

In a nearly 500-page "Stock Purchase Agreement" dated September 10, 2003 between HGHC and its shareholders and Harrah's, Harrah's agreed to purchase all of the stock of HGHC. Shortly after the consummation of the agreement, Harrah's deposited $75 million with Horseshoe, consummated an

integration for the absorption of Horseshoe properties, and executed side agreements to further implement the purchase agreement of September 2003.

When it appeared in May 2004 that the sale of Horseshoe Casino to Harrah's would receive all necessary regulatory approvals, Binion told Robert Piper and Robin for the first time that he would not honor his promise and pay to Petitioners an amount commensurate with the most favored nations' provision of the Buyout Agreement. His decision not to honor this commitment is further evidence of the fraudulent scheme perpetrated by Binion upon Petitioners.

On or about September 10, 2003, Harrah's announced that it had signed a "definitive agreement to acquire Horseshoe Gaming Holding Corp. for $1.45 billion, including assumption of debt." Pursuant to the Stock Purchase Agreement, Harrah's agreed to pay approximately $917 million in cash for Horseshoe Gaming Holding Corp. and assume $533 million in debt. The equity value of the Horseshoe companies was far in excess of what Binion had previously represented to the Petitioners. Binion, aided and abetted by others, concealed material accounting information, manipulated corporate structures, and perpetuated a massive fraud scheme, implemented over many years but only recently discovered, which was designed to artificially devalue the interests of the Petitioners. Prior to Harrah's acquisition of HGHC, HGHC and all of the predecessor Horseshoe entities were privately and closely held, unlike Harrah's. As a

result of accounting machinations, information concerning the true value of the companies was not readily ascertainable nor available until after the announcement of Harrah's agreement to acquire HGHC on September 10, 2003.

REASONS FOR GRANTING THE WRIT

(1) THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN NOT FOLLOWING THE SUBSTANTIVE LAW OF LOUISIANA AND THE DECISIONS OF THE HIGHEST COURT IN THE STATE OF LOUISIANA

This Honorable Court should grant certiorari because the Fifth Circuit in its six-page opinion did not conduct a full independent review of the state law determinations by the district court and failed to follow the substantive law of Louisiana and the decisions of the highest court of the State of Louisiana. This court has previously noted the fundamental questions of fairness and allocation of power between the state and federal judiciaries in *Salve Regina College v. Russell,* 499 U.S. 225, 111 S.Ct. 1217 (1991). If this case was presented to the Louisiana Supreme Court and or an intermediate appellant court, the Louisiana courts would require the burden of proof of full disclosure to be placed upon the respondent to avoid the consequences of the fiduciary breaches admitted by him. The opinion of the Fifth Circuit provides no analysis of the law of Louisiana. In fact, the opinion does not cite any substantive law

or jurisprudence whatsoever. In light of *Salve, supra,* the unpublished per curium opinion issued by the Fifth Circuit, can not withstand the scrutiny of being considered a *de novo* review and is nothing more than an exercise in the "rule of deference" which was considered a dramatic departure from traditional appellate court practice and the Federal Rules of Civil Procedure. This case is an *Erie R.R. Co. v. Thompkins,* 304 U.S. 64 (1938) case and as such should be decided within the parameters of Louisiana law. The opinion of the Fifth Circuit totally disregards Louisiana law and thereby denies Petitioners due process under the Constitution of the United States of America. This case cries for justice for the Petitioners who have been denied their day in court, their constitutional right to a jury trial and their constitutionally protected right that the Court of Appeals should conduct an independent *de novo* review of the grant of summary judgment by the district court. **It is of national importance to litigants across this land that they be assured the appellate courts of the federal judiciary will follow the proper standards of review within the appellate process and for this reason this Court should invoke its great discretion to review this matter.**

Judicial standards require the appellate court to consider affidavits, depositions, and other admissible evidence that evince specific facts over which there is a genuine issue for trial. FRCP Rule 56(C) and *Wallace v. Texas Tech Univ.*, 80 F.3d 1043, 1046-47 (5th

Cir. 1996). In this instance, the Fifth Circuit did not apply this standard. It is of national importance for this court to require the lower courts of the federal judiciary to follow the appropriate standards and occasionally, this court should invoke the granting of a writ of certiorari in order to reinforce the standards. This is such a case.

In this diversity case involving partners, the court of appeal did not consider and/or apply the black letter law of the Louisiana Civil Code as it pertains to a partner's dealings with other partners and the obligations required by law to provide full disclosure of breaches of fiduciary duties to avoid legal consequences. Article 2809 of the Louisiana Civil Code embraces the fiduciary duties of partners. The official revision comments of 1980 to this article under section (b) provide the pertinent principle of law establishing the legal error in this instance. The passage states:

> Consent by the partners or the partnership to permit activities that otherwise would be contrary to a partner's fiduciary duty should be given effect to avoid the consequences of this article **only** when the consent is given **after** there has been a **full disclosure** of **all relevant information**. (emphasis supplied)

In *Jansen v. Bellamore,* 147 La. 900, 86 So. 324 (La. 1920), the Louisiana Supreme Court at page 326 required full disclosure in a partnership relationship and stated the burden shifted to the partner in trust to demonstrate by convincing evidence the extent of full disclosure. The duty of full disclosure is owed to

partners and the partnership involving the compromise and release of claims. *W. A. McMichael Const. Co. v. D & W Properties, Inc.*, 356 So.2d 1115 (La. App. 1978), writ denied, 359 So.2d 198 (La. 1978) and *Barksdale v. Lincoln Builders, Inc.*, 764 So.2d 223, (La. App. 2nd Cir. 6/21/00) are cases upholding this principle. In *W. A. McMichael Const. Co., supra,* at page 1124 the court stated:

> Compromises are a species of contract which cannot be attacked because of error of law, but which may be rescinded because of error of fact, or in the case of fraud. LSA-C.C. Arts. 3078, 3079. See also LSA-C.C. Arts. 1828-1831. In the case of error, where the information which would have destroyed the error has been withheld by the other party to the contract, it comes under the heading of fraud, and invalidates the contract. LSA-C.C. Art. 1832.

The fact the Louisiana Supreme Court, the highest court in Louisiana, denied writs of certiorari in *McMichael, supra,* along with the *Jansen* case, *supra,* clearly show the courts of Louisiana as well as the Louisiana Civil Code would place the burden on Binion to show full disclosure was made in the face of his admitted fiduciary breaches. The fundamentally sound public policy of Article 2809 is in place to prohibit a partner from obtaining a contractual advantage such as a waiver and release without full disclosure. Otherwise, no partner would be safe in signing a general release when fiduciary breaches have not been disclosed. The disregard by the Fifth Circuit of the intermediate appellate courts of Louisiana and the

Louisiana Supreme Court's authoritative interpretation of partnership law requiring full disclosure was error and supports this court granting a writ of review. See *Bradshaw v. Richey*, 546 U.S. 74, 78, 126 S.Ct. 602, 605 (2005); *Stoner v. New York Life Ins. Co.*, 311 U.S. 464, 61 S.Ct. 336 (1940). This court has remanded cases for further consideration in light of decisions of state intermediate court of appeals. See *Exxon Co., U.S.A. v. Banque de Paris Et Des Pays-Bas*, 488 U.S. 920, 109 S.Ct. 299, 102 L.Ed.2d 319 (1988).

In *F.D.I.C. v. Abraham,* 137 F.3d 264, 267-268 (5th Cir. 1998), the Fifth Circuit held it was bound by controlling state law when applicable even if it was not a diversity case and stated:

> Even though federal subject matter jurisdiction of the case we review on appeal today is not grounded in diversity of citizenship, we nonetheless apply the rules of interpretation that have evolved since *Erie Railroad v. Tompkins*;[FN12] to the controlling state law here under examination. "When adjudicating claims for which state law provides the rules of decision, even when those claims are 'federal questions' in form, we are bound to apply the law as interpreted by the state's highest court."[FN13]. And, when a state's highest court has not spoken on an issue, our task is to determine as best we can how that court would rule if the issue were before it. In so doing, we are *bound* by an intermediate state appellate court decision only when we

> "remain unconvinced 'by other . . . data that the highest court of the state would decide otherwise.'"[FN14]

The application of *Ingram, infra,* was an internal contradiction of the application of the law by the Fifth Circuit justifying a granting of writ in this instance as outlined below.

The case of *Ingram Corp. v. J. Ray McDermott & Co., Inc.,* 698 F.2d 1295, (5th Cir. 1983) was relied upon heavily by the trial court and the court of appeal. However, *Ingram, supra,* was not a case involving a partnership or partners. Even *Ingram, supra,* at page 1315 recognized the distinction involving a fiduciary relationship wherein the court noted: **"Parties bargaining at arms length who are not in a fiduciary relationship with one another are not required to make known all possible claims against one another."** *Ingram* did not involve fiduciary relationships and the trial court and court of appeal erred in failing to apply the appropriate Louisiana law regarding fiduciaries and partners. Under Louisiana law, fraud is defined in Louisiana Civil Codes Article 1953 which provides: "Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction."

Without considering the factual issue of full disclosure regarding the claims of the Petitioners and requiring the Respondents to submit proof of full

disclosure, the trial court erroneously granted the summary judgment and the court of appeal compounded the ruling by failing to conduct an independent *de novo* review. Respondents did not submit one document as evidence of disclosure required to avoid the consequences of Article 2809. Jack Binion did not supply even an affidavit in support of disclosure. The trial court placed the requirement on the Petitioners to discover the information that should have been disclosed to them under the principle of full disclosure in fiduciary relationships. The trial court shifted the burden to partners in a fiduciary relationship to discover important information as to value involving the sale of the partnership and that is legal error. Maintaining the fiduciary duty incumbent upon the managing partner (buyer) of the obligation of the utmost good faith and fairness in their dealings, including but not limited to the obligation of full and complete disclosure of all important information as to value involving the buyout of the Petitioners was a requirement of Louisiana law overlooked by the trial court. The record demonstrated facts at issue involving the fiduciary breaches by Binion without any disclosure to the Pipers. This matter could not be resolved by summary judgment procedure and Petitioners were clearly entitled to a *de novo* review.

Louisiana law forbids any managing partner from securing an advantage from his limited partners as a result of "the slightest misrepresentation or concealment of material facts" by the managing partner. See *W. A. McMichael, supra.*

It is undisputed that Piper's concerns were allayed such that he made no complaints about non disclosure to Binion after 1996. In June, 1997 and November, 1997 Binion mortgaged the business and obtained loans in the sum of $160 million and $130 million respectfully, which funds were spent for purposes wholly unrelated to Horseshoe. These loans conferred upon the Petitioners no benefit. The buyout agreement was executed two years later in 1999. As *W. A. McMichael* put it, "the fiduciary duty continues through the sale or purchase of a partner's interest or through termination or liquidation of the partnership." *Id.* at 1122. Thus, Respondent Binion's duty of disclosure of material facts was ongoing and continuous, up until and, indeed, through the purchase of the Piper's partnership interest and until liquidation of the partnership. Binion could not remain silent from 1996 through 1999 when he knew the facts underlying the purchase of the Piper's interest were dynamic and subject to change.

The Fifth Circuit relied on *Ingram Corporation v. J. Ray McDermott & Co., supra,* to bar the claims of the Petitioners. While *Ingram* may be persuasive in another case it does not apply here. The *Ingram* case was a Fifth Circuit case that applied federal law to a federal claim. Here, the outcome is governed exclusively by Louisiana law. Second, in *Ingram*, the Court concluded that even a release that otherwise would operate to bar and preclude a claim would be vitiated by fraud committed by the party seeking to enforce the release. *Ingram*, even if it did apply,

would not preclude the Piper's claim of breach of fiduciary duty. The District Court concluded *McMichael* and *Barksdale* were distinguishable on their facts without providing an analysis of how or why they were distinguishable. The only distinguishable point between *W. A. McMichael*, *Barksdale* and this case is that those two cases were decided after a full trial on the merits and this case was concluded by summary judgment.

A reading of the Louisiana Civil Code Article 2809 and *McMichael* and *Barksdale, supra*, can only lead one to the conclusion that a different result would occur in this case if tried in a Louisiana state court. The Fifth Circuit provided no such analysis thus, leading to the obvious conclusion that a full independent *de novo* review was not conducted. Accordingly, a granting of this writ of certiorari is necessary in order to assure that the federal lower courts uniformly apply fundamental fairness and follow the rules of allocation of power between the federal and state judiciaries.

(2) CERTIORARI IS NECESSARY TO CORRECT A CONFLICT IN PANEL DECISIONS IN THIS UNPUBLISHED OPINION CASE WHICH CONFLICTS WITH A PUBLISHED DECISION OF ANOTHER PANEL OF THE FIFTH CIRCUIT.

Petitioners contend that this Court should grant a Writ of Certiorari because the unpublished per curium opinion in this case conflicts with a prior

published decision of another panel of the Fifth Circuit.

Further, the Fifth Circuit failed to follow the decision of the highest court in Louisiana that the sale of September 2003 between Harrahs and Horseshoe was not a consummated sale and also failed to follow the decision of the Fifth Circuit in *Narwahl, infra*. This failure deprived Petitioners of their participation rights under the buyout agreement of April 19, 1999.

The panel decision herein is in conflict with a previous decision of the Fifth Circuit in *Atlantic Lines, Ltd. v. Narwhal, Ltd.*, 514 F.2d 726 (5th Cir. 1975). The Fifth Circuit did not discuss the conflict but merely stated in its opinion, "We agree with the District Court's analysis" see opinion attached as Appendix 1. That is no response to the *Narwhal* decision because the district court never mentioned or dealt with *Narwhal*.

The appeal of the Piper Petitioners to the United States Court of Appeal for the Fifth Circuit was consolidated with the appeal of Co-Appellant, August Robin. Counsel for the Piper Petitioners in this Writ to the Supreme Court hereby adopt all of the arguments made by their Co-Appellant's counsel in their original brief, which discusses at length the Fifth Circuit opinion of *Atlantic Lines, Ltd. v. Narwhal, Ltd., supra*.

Appellant, Robin filed a petition for panel rehearing emphasizing that the Court did not address

the issue of the *Atlantic Lines, Ltd. v. Narwhal, Ltd.,* case in its per curium opinion. The answer from the Fifth Circuit was "denied" as to the application for panel re-hearing.

Rather than enter into a lengthy argument concerning this matter, as stated above, counsel for Petitioners adopt all of the arguments made by their co-counsel for Appellant, Robin on the issues involving the Most Favored Nation Clause.

(3) PETITIONERS WERE DENIED THEIR CONSTITUTIONAL RIGHT TO HAVE THE CASE REVIEWED BY THE COURT OF APPEALS SINCE THE UNPUBLISHED PER CURIUM OPINION DOES NOT CONSTITUTE A *DE NOVO* REVIEW AS REQUIRED BY FEDERAL PROCEDURE AND THIS COURT.

This Honorable Court should grant certiorari because of a complete failure of the Fifth Circuit to conduct a *de novo* review.

> "The determination of a state law, however is a legal question, and although the considered decision of a district judge experienced in the law of a state naturally commands the respect of an appellate court, a party is entitled to meaningful review of that decision just as he is of any other legal question in the case; and just as he would have been if the case had tried in a sate court."

19 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure, Sec. 4507, pp. 106-110 (1982) – cited in footnote 5 in *Salve Regina College, supra.* The Fifth Circuit opinion is not a "meaningful review" of the district court's decision.

The court of appeal held the claims were barred by the release under *Ingram, supra,* and that the Piper Petitioners failed to establish a breach of any fiduciary duties during the buyout negotiations in three sentences of the opinion. Again, no other analysis that would support or indicate a *de novo* review was provided. The three sentences in the unpublished per curium opinion by the court of appeal was not an independent full *de novo* review. See *Salve Regina College, supra.* The use of an unpublished per curium opinion to affirm the motion for summary judgment was a denial of substantive due process in light of controlling state law and a denial of procedural due process in failing to review the case *de novo.*

In further consideration for the granting of this application for writ of certiorari is the record of deposition testimony of Jack Binion that was attached to Petitioners' opposition to Respondents' MSJ. It provided a plethora of facts that are in dispute with the factual findings by the trial court and demonstrate the failure of the court of appeal to conduct a *de novo* review. In regards to Louisiana partnership law, Jack Binion made many startling admissions reflecting non disclosure and a violation of the burden placed upon him. For instance, a mere sample of facts

disclosed in *Binion's deposition are as follows: 1) He admitted he mortgaged assets of the business without the knowledge and consent of Petitioners. P. 69,70,71, & 141.* 2) He admitted millions were taken from Horseshoe Entertainment and used at Horseshoe Tunica without the knowledge and consent of Petitioners. *P. 73,74,75,76,78,79, & 80.* 3) He admitted in connection with the buyout negotiations with Petitioners, that he failed to give Petitioners any documents reflecting the value of their business. *P.167.* 4) He admitted the income capitalization method used by Charles Gibson to value the casino (income times a multiple) is an acceptable method to value a casino. *P. 161.* Louisiana law forbids any managing partner from securing an advantage from his limited partners as a result of "the slightest misrepresentation or concealment of material facts" by the managing partner. *W. A. McMichael, supra,* 356 So.2d at 1122. Jack Binion was the managing partner and did not disclose the aforementioned breaches in dealing with his partners.

The release could not act as a bar to the Pipers claims because Jack Binion never fulfilled his obligation required by Louisiana Civil Code Article 2809 and the Louisiana Supreme Court to fully disclose the breaches described above. A proper full independent *de novo review* would have recognized and required evidence of the "full disclosure standard." Instead, the ruling of the trial court was buried in an unpublished per curium opinion by the Fifth Circuit.

Further evidence of the lack of a full independent *de novo review* by the court of appeal is shown by the statement of the court of appeal at page 5 of the opinion which states: "Second, the Pipers fail to establish that Binion breached any fiduciary duties during the Buyout Agreement negotiations." The record disputes this statement in that Binion admitted in deposition that he did not disclose any documents reflecting the value of the business. The record contains internal documents of Binion dated in December, 1998, and May, 1999, shortly before and after the sale, that reflect the value of the business was approximately three times greater than what Binion paid the Pipers. The record contains the affidavit of an expert, Charles Gibson, who used a mathematical formula accepted by Binion demonstrating the value of Petitioners' interest in the business. It was approximately three times greater than the amount paid to the Pipers. Thus, substantial evidence existed in the record demonstrating that Binion knew the value he was paying the Pipers was approximately one-third of its true value. Yet, Binion did not disclose this information to the Pipers. This blatant breach of fiduciary duty was not considered in the three-sentence *de novo* review of the court of appeal. Important for the consideration by this court is the failure of the court of appeal to apply the black letter law of Louisiana (Article 2809) involving the duties owed by a partner to his other partners and the only way to avoid the consequences of a breach is to provide full disclosure to the partners.

The Fifth Circuit Court of Appeals denied the constitutional right of due process to the Petitioners; and did not conduct an independent *de novo* review of the Summary Judgment proceeding from the Court below. The Federal District Court granted Summary Judgment, inappropriately, and its error was compounded by the Fifth Circuit's total disregard of the entire record and its failure to conduct a *de novo* review in this case. It is clear that the Piper Petitioners were deprived of due process in violation of the Fourteenth Amendment of the U.S. Constitution.

In this extremely important case involving the rights of minority partners vis-a-vis the majority partner the Fifth Circuit allowed via summary proceeding a dismissal of well-founded claims, which should be tried by a jury. The majority owner, Jack Binion put no proof into the record to show that a full disclosure as required by Louisiana law was ever made to his minority partners.

The district court, contrary to established jurisprudence made credibility determinations which are inappropriate for summary judgment. The complaints made by the Piper Petitioners about the business venture with Respondent, Binion only evidenced Robert Piper, Jr.'s concern till December, 1996 as evidenced by the last letter of complaint from Robert Piper, Jr. However, the sale of the interest in the partnership by Robin and Piper occurred on September 21, 1999. In the interim between December, 1996 and September 21, 1999 there is no proof in the

record, for indeed there could be none, that any disclosure was made to the minority partners.

Louisiana law is strikingly clear that full disclosure is required. See *McMichael* and *Barksdale*, *supra*. The Petitioners want a trial; want their day in Court; all of which has been denied to them in contravention of the Constitution of the United States Amendment Seven, especially in light of the fact that Louisiana law mandates a jury trial on these issues. The district judge's opinion does not even mention Louisiana codified law of the Civil Code Article 2809. Appellees did not mention it in their brief to the Appellate Court. Why? Because they can't discuss it since it is controlling and proves that the Judge is wrong and this case should be reversed.

The district court committed compound errors of law in applying the release and the Fifth Circuit totally misapplied the *Ingram* case, *supra*. This is an *Erie* case. It is mandated that the Court must apply Louisiana substantive law as if this case were being tried in state court. This case should have a Louisiana resolution – it doesn't – again the Court strays into clear error by applying the *Ingram* case improperly. The cornerstone of the district judge's decision is simply wrong. The Judge is not only wrong but he missed the target altogether and the Fifth Circuit put a rubber stamp on it with an extremely brief per curium opinion. Piper and his other minority partners trusted Binion; he misled them; he misused his position and violated the partnership agreement without disclosure before he bought them out. Justice

cries out in this case for these issues to be tried before a jury.

The opinion of the Fifth Circuit demonstrates the appellate court deferred to the ruling of the district court without any citation to or analysis of the Louisiana law of partners and partnership.

CONCLUSION

This Court should grant certiorari and follow the precedent established in *Salve Regina College v. Russell, supra*. The lower court failed in its duty to conduct a *de novo* review and the case should be remanded for such a review.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-30151

AUGUST ROBIN; ROBERT PIPER; CASSANDRA PIPER; WENDELL PIPER

Plaintiffs-Appellants

v.

JACK B BINION; HORSESHOE ENTERTAINMENT; HORSESHOE GAMING HOLDING CORP; NEW GAMING CAPITAL PARTNERSHIP

Defendants-Appellees

Consolidated With
Case No. 07-30156

AUGUST ROBIN

Plaintiff-Appellant

v.

JACK B BINION; HORSESHOE ENTERTAINMENT; HORSESHOE GAMING HOLDING CORP; NEW GAMING CAPITAL PARTNERSHIP

Defendants-Appellees

Consolidated With
Case No. 07-30159

ROBERT PIPER; CASSANDRA PIPER; WENDELL PIPER

Plaintiffs-Appellants

v.

JACK B BINION; HORSESHOE ENTERTAINMENT; HORSESHOE GAMING HOLDING CORP; NEW GAMING CAPITAL PARTNERSHIP

Defendants-Appellees

Appeals from the United States District Court
for the Western District of Louisiana

(Filed March 27, 2008)

Before JOLLY, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Appellants August Robin, Robert Piper, Cassandra Piper, and Wendell Piper appeal the district court's grant of summary judgment in favor of Appellee Jack Binion, the general partner of Horseshoe

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Entertainment, LP ("Horseshoe Entertainment"). We AFFIRM.

I.

In April 1993, Horseshoe Entertainment was formed to operate the Horseshoe Casino in Bossier City, Louisiana. The general partner – owning an 89% interest – was New Gaming Capital Partnership ("NGCP"). Jack Binion held a controlling interest in NGCP. The limited partners of Horseshoe Entertainment were Appellants: August Robin (3%), Wendell Piper (0.5%), Cassandra Piper (4.58%), and Frank Pernici (2.92%).[1] Appellant Robert Piper, the husband of Cassandra, claims standing by virtue of the marital community.

In 1995, Binion reorganized his various casino holdings and reached a merger agreement with another casino operator. The terms of their agreement required Binion to buy out Robin and the Pipers before May 31, 1999, or the merger would be cancelled, and Binion would forfeit a $10 million deposit. Accordingly, Binion approached Robin and the Pipers about selling their limited partnership interests in Horseshoe Entertainment.

On April 21, 1999, Robin and the Pipers signed separate agreements with Binion and the affiliated Horseshoe entities to sell their limited partnership

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[1] Pernici sold his interest and is not a party to this case.

interests (the "Buyout Agreements"). The Buyout Agreements contained a participation clause providing that:

> If, *within five years of the date of this Agreement,* the Binion Family Interests collectively *sells* in excess of a 50% interest in Horseshoe Gaming, LLC, for a purchase price consisting of cash, debt or publicly traded securities or any combination thereof having a value of in excess of $5,350,000 per 1% interest sold, then [the Pipers and Robin] shall receive in the aggregate, a cash sum equal to 2 1/4% of the value of the sale in excess of $5,350,000 per 1% interest sold (such cash sum equal to 2 1/4% being the "Participation Payment").

(emphasis added). The Buyout Agreements also included a release and waiver provision, providing that each Appellant: "hereby release[s], discharge[s] and waive[s] any and all claims, causes of action, and demands of any kind or nature whatsoever that now exist, whether known or unknown, which he may have against [Appellees]. . . ." In exchange for this provision, the Pipers and Robin were each paid $500,000. However, the Louisiana Gaming Control Board (the "Board") never officially approved the Buyout Agreements.

In 1999, the various Horseshoe entities were reorganized into a Delaware corporation – Horseshoe Gaming Holding Corporation ("Holding Corp."). On September 10, 2003, Holding Corp. entered into a

Stock Purchase Agreement with Harrah's Entertainment, Inc. ("Harrah's"). Section 1.2 of the Stock Purchase Agreement provided that: "[T]he purchase and sale of [Holding Corp.'s] Shares (the '*Closing*') shall take place . . . on the third business day after the satisfaction or . . . waiver of the conditions set forth in Article VII," which included approval by the relevant government authorities.

Around September 2003, Binion told Robert Piper, "that [the sale to Harrah's] will trigger the [participation] clause, and I will pay you your money." However, the Federal Trade Commission did not approve the deal until early June 2004. Because this was more than five years after the execution of the Buyout Agreements (April 21, 1999), Binion determined that the participation clause of the Buyout Agreements was no longer effective and refused to pay the Pipers or Robin.

Appellants filed suit in Louisiana state court, alleging fraud and breach of fiduciary duties, rescission, misrepresentation, detrimental reliance, and statutory deceptive trade practices. The case was removed to federal court based on diversity jurisdiction. Appellees moved for summary judgment, and the district court granted summary judgment on all of Appellants' claims, except for the Pipers' claim for revocation of "comp privileges."[2] The court also ruled

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[2] The district court granted the Pipers' "Motion to Dismiss Comp Claim with a Reservation of Right to Pursue Appeal of

(Continued on following page)

in favor of Horseshoe Entertainment on a counterclaim it asserted against Robin for a $550,000 debt. Appellants timely appealed.

II.

We review the district court's grant of summary judgment *de novo,* applying the same standard as the district court. *Atkins v. Hibernia Corp.,* 182 F.3d 320, 323 (5th Cir. 1999).

III.

A. The Pipers' Claims

The Pipers argue that the district court erred in finding that: (1) the Buyout Agreement's release and waiver provision barred the fraud and breach of fiduciary duty claims; (2) the fraud and breach of fiduciary duty claims fail on the merits; (3) the Pipers and Binion did not establish an oral contract to buy out the participation clause; and (4) the Buyout Agreements were enforceable despite Binion's failure to obtain official approval from the Board.

The Pipers' arguments lack merit. First, given the broad language of the release and waiver provision – as well as the substantial monetary consideration paid – the provision remains in effect and bars

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Dismissed Claims." Thus, this appeal is brought pursuant to a final judgment.

the Pipers' fraud and breach of fiduciary duty claims. *See Ingram Corp. v. J. Ray McDermott & Co.*, 698 F.2d 1295, 1312 (5th Cir. 1983) ("When a release provides that 'any and all claims,' 'past, present, or future' are to be extinguished, a court is required to enforce its provisions both as to known and unknown claims."). Second, the Pipers fail to establish that Binion breached any fiduciary duties during the Buyout Agreement negotiations. Thus, even if the Pipers' claims were not barred, they fail on the merits. Third, Louisiana law requires a witness to prove the existence of an oral contract.[3] The Pipers do not fulfill this requirement because the only witness they present – Binion – disavows the existence of said oral contract. Fourth, regarding rescission of the Buyout Agreements, the Pipers and the Board consistently acted as if the agreements were valid, and, therefore, we agree with the district court's disposition of the Pipers' claims.

B. The Stock Purchase Agreement Did Not Trigger the Participation Clause

Both Robin and the Pipers argue that the district court erred in finding that the Stock Purchase Agreement with Harrah's did not trigger the participation clause of the Buyout Agreements. The district

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[3] LA. CIV. CODE ANN. art. 1846 provides that "[i]f the price or value is in excess of five hundred dollars," an oral contract "must be proved by at least one witness and other corroborating circumstances."

court found that: (1) the participation clause requires an actual completed sale; (2) the Stock Purchase Agreement was a contract to sell, not a contract of sale; and (3) the sale occurred outside of the participation clause's five-year window. We agree with the district court's analysis. We find that the participation clause was not triggered because the sale to Harrah's occurred after the five-year period.

C. Counterclaim Against Robin

Finally, we agree with the district court that Horseshoe Entertainment prevails on its $550,000 counterclaim against Robin. There is no need to vacate the judgment.

IV.

Accordingly, the judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

AUGUST ROBIN, ET AL.	CIVIL ACTION NO. 04-1695
VERSUS	JUDGE S. MAURICE HICKS, JR.
JACK B. BINION, ET AL.	MAGISTRATE JUDGE HAYES

MEMORANDUM RULING

(Filed Jan. 4, 2007)

Before the Court is a Motion for Summary Judgment (Record Document 314) filed by Defendants, Jack B. Binion ("Binion") Horseshoe Entertainment, L.P., Horseshoe Gaming Holding Corporation, and New Gaming Capital Partnership, Inc. Defendants move for summary judgment dismissing all of Plaintiffs' claims on the grounds that there is no genuine issue of material fact and that they are entitled to summary judgment as a matter of law. *See id.* Both Plaintiff August "Duke" Robin ("Robin") and the Piper Plaintiffs oppose the Motion for Summary Judgment. *See* Record Documents 369 & 376. Based on the following analysis, the Motion for Summary Judgment filed by Defendants is **GRANTED IN PART** and **DENIED IN PART**.

I. FACTUAL BACKGROUND.[1]

On April 20, 1993, the limited partnership, Horseshoe Entertainment, L.P., was formed to own and operate the Horseshoe Casino in Bossier City, Louisiana. The General Partner was New Gaming Capital Partnership ("NGCP") and was controlled by Binion. NGCP owned an eighty-nine percent (89%) interest in Horseshoe Entertainment, L.P. The limited partners of Horseshoe Entertainment, L.P. were Plaintiffs, Robin, Wendell Piper, and Cassandra Piper. A fourth limited partner, Frank Pernici, sold his limited partnership interest to NGCP effective December 31, 1995. Plaintiff Robert Piper claims an ownership interest in Horseshoe Entertainment, L.P. by virtue of the community property existing between him and his wife under Louisiana law.

In return for Robin and Robert Piper's assistance in seeking a Louisiana gaming license, Binion gave

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[1] The Piper Plaintiffs submitted what appears to be disputed legal issues in response to Defendants' Motion for Summary Judgment. *See* Record Document 376-4. In violation of L.R. 56.2, the Piper Plaintiffs did not submit a filing that specifically demonstrates the existence of any genuine issues of fact. Further, the Statement of Undisputed Material Facts (Record Document 369-19) submitted by Robin deals exclusively with issues surrounding the Participation Clause and the Stock Purchase Agreement. Therefore, for purposes of the Factual Background section of the instant Memorandum Ruling, the Court has relied heavily, and almost exclusively, on the unchallenged Rule 56.1 Statement of Material Facts as to Which There is No Genuine Issue to be Tried (Record Document 314 at 3-13) submitted by Defendants.

the aforementioned limited partnership interests to Robin and Robert Piper. Robert Piper subsequently gave his interest to his wife, Cassandra, and brother, Wendell.

For most of the period from December 1993 to December 1998, Robert Piper served as "local general counsel" for Horseshoe Entertainment, L.P. and received over $2.5 Million in compensation in the form of annual retainers and hourly fees. He continued to represent Horseshoe Entertainment, L.P. on an hourly basis through at least June 2004. Robin also received substantial fees for performing "consulting work" for Binion and other Defendants from May 12, 1992 through December 31, 1998. During that period, Robin, his company, The Robin Group, Inc., and/or his partner, Jody Taylor, were paid over $1 Million in consulting fees.[2]

Both Horseshoe Bossier (Bossier City, Louisiana) and Horseshoe Tunica (Biloxi, Mississippi) were successful casino ventures. The management team, including Binion, wanted to grow the Horseshoe casino business. On the other hand, the limited partners primarily were interested in current distributions. Over the course of several years, Robert Piper complained about the operations of Horseshoe

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[2] The facts set forth in this paragraph are from the Rule 56.1 Statement of Material Facts as to Which There is No Genuine Issue to be Tried (Record Document 314 at 3-13) submitted by Defendants. *See supra* n. 1.

Casino and alleged violations of the Horseshoe Entertainment, L.P. partnership agreement. Robin was well aware of Robert Piper's many complaints, which included various alleged violations of the partnership covenants: major capital expenditures without the concurrence of the partners; failing to meet every calendar quarter; failing to make quarterly distributions; refusing to give partners tax distributions; using the monies of Horseshoe Entertainment, L.P. for purposes wholly unrelated to the partnership; adding partners without the concurrence of existing partners; the creation of Horseshoe Gaming, Inc., without the approval of the limited partners; the injudicious and unfair expenditure of significant sums from Horseshoe profits; the engagement of unnecessary personnel; the transfer by Binion of his interest in Horseshoe Entertainment, L.P. to another entity without the approval of the limited partners; failing to disburse partnership profits in accordance with an agreed upon formula; commingling Horseshoe funds with those of other entities; conducting the business of Horseshoe Entertainment, L.P. at the meetings of Horseshoe Gaming; mortgaging and encumbering the property of the partnership without the agreement of the limited partners; and dissolving the partnership created by the parties without their consent and in violation of the agreement with Louisiana partnership law.

In October 1995 Horseshoe Gaming, L.L.C. was formed, and all of the owners of interests in Horseshoe Bossier and Horseshoe Tunica, except Plaintiffs

and Frank Pernici, exchanged their interests in their respective limited partnerships for an interest in Horseshoe Gaming. The Pipers and Robin did not exchange their interests because they believed the Horseshoe Entertainment Limited Partnership Agreement, prepared by Robert Piper, gave the Louisiana limited partners greater rights than they would have had in the parent, Horseshoe Gaming. Consequently, up until the time of the sale of their interests in Horseshoe Entertainment, L.P. in April 1999, the Pipers and Robin continued as limited partners of Horseshoe Entertainment, L.P.

In September 1998, Horseshoe Gaming, L.L.C. entered into an agreement to merge with Empress Acquisition Illinois, Inc. and Empress Acquisition, Inc., which, respectively, owned riverboat casino properties in Illinois and Indiana. However, after the Empress merger agreement had been executed, Defendants were informed that the Illinois Gaming Board would not approve the merger if the Pipers and Robin owned any interest in Horseshoe Entertainment, L.P. or any Horseshoe entity. Consequently, on March 19, 1999, the Empress Merger Agreement was amended by the First Amendment to Merger Agreement to provide Empress with the right to terminate that agreement and keep Horseshoe's $10 Million deposit, if the Pipers and Robin were not bought out by May 31, 1999.

Binion informed Robert Piper and Robin that he had to buy them out or he could not close the Empress deal. After months of negotiations, on April 21,

1999 the Pipers and Robin executed Buyout Agreements, pursuant to which they would sell their limited partnership interests in Horseshoe Entertainment, L.P. The Pipers and Robin signed separate agreements, each contingent upon the other's execution of a substantially similar agreement. With the exception of differences in some of the dollar amounts to be paid, including "forgiveness" of loans to the limited partners and the agreement to purchase Robin's option rights in Horseshoe Tunica, the Buyout Agreements were identical in all material respects. Both Buyout Agreements included a broad mutual release and waiver provision. The cash consideration paid to the Pipers for their release and waiver was $500,000 and the consideration to Robin for his release and waiver was $500,000. Specifically, the release and waiver provisions provided:

> 7. *Payment of Release and Waiver.* In exchange for the release and waiver by Duke [Robin] described in Paragraph 8, Horseshoe Companies shall deliver, upon the Effective Date of this Agreement, to Duke the title, free of any liens to the Horseshoe Entertainment, L.P. car in his possession and on December 15, 1999, the amount of $500,000.00.
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> 8. *Release and Waiver.* Except for Group, Duke hereby represents and warrants that he does not now have nor has he ever held any ownership interest in, or position with any other entity of any kind or nature whatsoever, having any

> claim against Horseshoe Companies or Binion or any of their or his current or former agents, employees, partners, officers, servants, directors, attorneys, affiliates, successors and assigns. Except for the obligation created or reaffirmed by virtue of this Agreement, Duke and Group hereby release, discharge and waive any and all claims, causes of action, and demands of any kind or nature whatsoever that now exist, whether known or unknown, which he may have against the Horseshoe Companies or Binion or any of their or his current or former agents, employees, partners, officers, servants, directors, attorneys, affiliates, successors and assigns. Except for the obligation created or reaffirmed by virtue of this Agreement, the Horseshoe Companies and Binion hereby release, discharge and waive any and all claims, causes of action, and demands of any kind or nature whatsoever that now exist, whether known or unknown, which each may have against Duke or Group or any of his current or former agents, employees, partners, servants, attorneys, successors and assigns.

The Buyout Agreements also contained an integration clause:

> 27. *Entire Agreement.* This Agreement contains the entire Agreement of the parties thereto with respect to the subject matter hereof and shall be deemed to supercede all

> prior or contemporaneous agreements, representations, and understandings, whether written or oral concerning the subject matter of this Agreement. This Agreement states any and all payments, debts and obligations of the Horseshoe Companies owed to Duke and there are no other remaining obligations. Except as otherwise provided herein, all terms and provisions of the Partnership Agreement of Horseshoe Entertainment, L.P. in effect as of the execution hereof, shall remain in full force and effect.

Another provision negotiated by Plaintiffs and contained in the Buyout Agreements is the following Participation Clause, or what is often referred to as the Most Favored Nations Clause:

> 6. *Participation in Sale by Binion.* If, within five years of the date of this Agreement, the Binion Family Interests collectively sells in excess of a 50% interest in Horseshoe Gaming, LLC, for a purchase price consisting of cash, debt or publicly traded securities or any combination thereof having a value of in excess of $5,350,000 per 1% interest sold, then Duke [Robin] shall receive a cash sum equal to 2 1/4% of the value of the sale in excess of $5,350,000 per 1% sold (such cash sum equal to 2 1/4% being the "Participation Payment"). For the purposes of this paragraph, the value of the sale shall be equal to (i) the cash purchase price, plus (ii) 80% of the value of the publicly traded securities as

> determined by the last sales price of such securities at the close of the market upon which such securities are traded, on the date the Binion Family Interests receives such securities, plus (iii) 80% of the present value of the debt. For the purposes of this paragraph, the Binion Family Interests shall mean, Binion or any entities owned or controlled by Binion, or any member of his family or any trust for the benefit of any member of his family. In the event that Duke is are entitled to the Participation Payment, all sums due from Duke to Horseshoe Companies shall be due and payable immediately to the extent of the Participation Payment.

As evidenced by the language quoted above, the Participation Clause granted the Pipers and Robin an opportunity to participate in the proceeds from the Binion Family's sale of more than fifty percent (50%) of their interest in Horseshoe Gaming, L.L.C.; however, that opportunity was limited by certain specific conditions set forth that agreement. The right to participate was triggered upon the sale of more than fifty percent (50%) interest of the Binion Family's interest in Horseshoe, but only if that sale occurred within five (5) years of the date of the Buyout Agreements, April 21, 1999.

In a "Stock Purchase Agreement" dated September 10, 2003 between HGHC and its shareholders and Harrah's Entertainment, Inc., Harrah's agreed to

purchase all of the stock of HGHC at a future date. Sections 1.1 and 1.2 of the Stock Purchase Agreement provided:

> Section 1.1 Basic Transaction. On the terms and subject to conditions of this Agreement, Parent [Harrah's] agrees to purchase from each Seller, and each Seller agrees to sell to Parent, all of his, hers [sic] or its Shares for the consideration specified below in this Article I.
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> Section 1.2 Closing. Unless this Agreement has been terminated pursuant to Section 8.1, upon the terms and subject to the conditions set forth in this Agreement, the purchase and sale of the Shares (the "Closing") shall take place at 10:00 a.m., California time, on the third business day after the satisfaction or (to the extent permitted by applicable law and this Agreement) waiver of the conditions set forth in Article VII (other than those conditions to be satisfied or waived at the Closing), at the offices of Latham & Watkins LLP, 650 Town Center Drive, 20th Floor, Costa Mesa, California 92626, or at such other time, date or place agreed to in writing by Parent and the Company. The date on which the Closing occurs is referred to in this Agreement as the "Closing Date."

Article VII of the Stock Purchase Agreement details the many conditions that had to be satisfied (or waived) before the sale could close, including obtaining various governmental consents to the proposed sale. Article VIII of the Stock Purchase

Agreement also specifies numerous circumstances under which the parties could terminate the Agreement. Article VIII(b) of the Stock Purchase Agreement specifically allows termination by either party "if the transactions contemplated hereby shall not have been consummated on or prior to June 11, 2004." This paragraph also goes on to state that the June 11, 2004 date can be extended to as late as September 11, 2004 and refers to this as the "Outside Date" for the Closing.[3]

In May 2004, Robert Piper and Jack Binion met in a restaurant at the Horseshoe Bossier casino. At that time, Piper asked Binion if he was going to pay him pursuant to the Participation Clause. Binion told him that because the sale to Harrah's had not taken place within the five year term of the Participation Clause, *i.e.*, on or before April 21, 2004, the Pipers were not entitled to any payment under the Participation Clause and Binion was not going to pay him any more money. When all the conditions of the Stock Purchase Agreement had been fulfilled, on July 1, 2004, the purchase and sale of the shares to Harrah's was closed and Harrah's payment to the sellers, via the sellers' representative, was made. By that date, the Participation Clause had expired.

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[3] Interestingly, the 1999 Buyout Agreements do not contain a similar "extension" provision. The parties to the 1999 Buyout Agreements were free to bargain for, or attempt to bargain for, such a provision at any time.

When the Pipers did not get any money from the sale to Harrah's, Robert Piper met and/or conferred with Jamie Perdigao ("Perdigao"), a Louisiana lawyer with the firm of Adams & Reese. These communications occurred from May 2004 until August 2004. Perdigao was the Louisiana attorney who represented Horseshoe in virtually all Louisiana gaming regulatory matters. The Horseshoe entities had paid Perdigao and his law firm millions of dollars for their representation over the years. Despite such representation, and Piper's own legal representation of Horseshoe Entertainment, L.P., Robert Piper collaborated directly with Perdigao in developing and drafting the original petition (complaint) filed in this matter. Piper paid $25,000.00 to Adams & Reese for Perdigao's assistance in developing this lawsuit.

II. PROCEDURAL BACKGROUND.

Plaintiffs filed their complaint on July 27, 2004 in the First Judicial District Court, Parish of Caddo, State of Louisiana. *See* Record Document 1. Defendants filed a Notice of Removal, seeking to have the case removed to this Court, on August 12, 2004. *See* Record Document 4. A Removal Order was entered on August 23, 2004. *See* Record Document 6.

On November 16, 2004, Defendants answered the complaint and also filed a counterclaim against Plaintiff Robin. *See* Record Document 28. Plaintiff Robin answered the counterclaim on January 31, 2005 and later filed a First Supplemental and

Amended Answer to Counterclaim. *See* Record Documents 36 & 89. Late in 2005, both Plaintiff Robin and the Piper Plaintiffs filed amended complaints. *See* Record Documents 91 & 96. Defendants filed their answers to both Amended Complaints in December 2005 and January 2006. *See* Record Document 100 & 108. Then, Robin again amended his complaint in July 2006 and Defendants answered in August 2006. *See* Record Documents 270 & 326.

In October 2005, this Court ruled on multiple magistrate appeals and refereed several discovery disputes. These occurrences prompted this Court to "monitor and manage this case for the foreseeable future," meaning that all motions, including any motions relating to discovery, were set before the District Judge, as compared to the Magistrate Judge. *See* Record Document 81.

All parties to the instant action filed motions for summary judgment or partial summary judgment. On July 13, 2006, Plaintiff Robin filed a Motion for Partial Summary Judgment. *See* Record Document 210. The Piper Plaintiffs filed their own Motion for Partial Summary Judgment on August 17, 2006. *See* Record Document 318. Also on August 17, 2006, the Defendants filed the instant Motion for Summary Judgment, seeking dismissal of all of Plaintiffs' claims. *See* Record Document 314. Discovery continued after these dispositive motions were filed.

According to the most recent scheduling order entered in this case, the above-captioned matter is set

for a pretrial conference on January 5, 2007 and a jury trial on January 22, 2007. *See* Record Document 346.

III. LAW AND ANALYSIS.

A. Summary Judgment Standard.

Summary judgment should be granted if the record, taken as a whole, "together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *New York Life Ins. Co. v. Travelers Ins. Co.*, 92 F.3d 336, 338 (5th Cir. 1996). The Supreme Court has interpreted the plain language of Rule 56(c) to mandate "the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986); *see also Gunaca v. Texas*, 65 F.3d 467, 469 (5th Cir. 1995). A party moving for summary judgment "must 'demonstrate the absence of a genuine issue of material fact,' but need not negate the elements of the nonmovant's case." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (quoting *Celotex*, 477 U.S. at 323-25, 106 S. Ct. at 2552). If the moving party "fails to meet this initial burden, the motion must be denied,

regardless of the nonmovant's response." *Little,* 37 F.3d at 1075.

If the moving party meets this burden, Rule 56(c) requires the nonmovant to go beyond the pleadings and show by affidavits, depositions, answers to interrogatories, admissions on file, or other admissible evidence that specific facts exist over which there is a genuine issue for trial. *Wallace v. Texas Tech Univ.,* 80 F.3d 1042, 1046-47 (5th Cir. 1996). The nonmovant's burden may not be satisfied by conclusory allegations, unsubstantiated assertions, metaphysical doubt as to the facts, or a scintilla of evidence. *Little,* 37 F.3d at 1075; *Wallace,* 80 F.3d at 1047. Factual controversies are to be resolved in favor of the nonmovant, "but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Wallace,* 80 F.3d at 1048 (quoting *Little,* 37 F.3d at 1075); *see also S.W.S. Erectors, Inc. v. Infax, Inc.,* 72 F.3d 489, 494 (5th Cir. 1996). The Court will not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts." *McCallum Highlands v. Washington Capital Dus, Inc.,* 66 F.3d 89, 92 (5th Cir. 1995), *as revised on denial of rehearing,* 70 F.3d 26 (5th Cir. 1995). Unless there is sufficient evidence for a jury to return a verdict in the nonmovant's favor, there is no genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249-51, 106 S. Ct. 2505, 2511 (1986).

In order to determine whether or not summary judgment should be granted, an examination of the

substantive law is essential. Substantive law will identify which facts are material in that "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.*

With these principles in mind, the Court now turns to a review of the claims at issue.

B. Claims in the Main Demand.

1. Release.

Both the Piper Buyout Agreement and the Robin Buyout Agreement contain an express, negotiated release and waiver provision for which each group was paid a half a million dollars. The language in both agreements is identical:[4]

> 8. *Payment of Release and Waiver.* In exchange for the release and waiver described in Paragraph 9, Horseshoe Companies shall deliver the aggregate amount of $500,000 to the Pipers on January 15, 2000.
>
> 9. *Release and Waiver.* . . . [E]ach of the Pipers hereby releases, discharges and waives any and all claims, causes of action and demands of any kind or nature whatsoever that now exist, whether known or unknown,

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[4] Out of convenience, the Court is quoting from only one of the Buyout Agreements, the Piper Buyout Agreement.

> which he may have against the Horseshoe Companies or Binion. . . .

Record Document 376, Exhibit 8, ¶¶ 8-9.

Louisiana Civil Code Article 3071 states, in pertinent part:

> A transaction or compromise is an agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing.
>
> This contract must be either reduced into writing. . . .

La. C.C. Art. 3071. Under Louisiana law, "a release of a claim executed in exchange for consideration received is, in effect, a compromise." *Brown v. Drillers, Inc.*, 93-1019 (La. 1/14/94), 630 So.2d 741, 747.

Defendants maintain that the broad release and waiver language in the 1999 Buyout Agreements establishes that, as a matter of law, each of the Plaintiffs clearly released and waived any and all claims known or unknown which they may have had as of April 21, 1999. Thus, Defendants moved for summary judgment, seeking the dismissal of any such known or unknown claims. In support of their Motion for Summary Judgment, Defendants rely on *Ingram Corporation v. J. Ray McDermott & Co., Inc., et al.*, 698 F.2d 1295 (5th Cir. 1983). *Ingram* involved a

plaintiff who sought to vitiate a release that contained broad and express language[5] several years after it had been executed by asserting that the defendant had failed to disclose an existing, on-going anti-trust conspiracy during the negotiations leading up to the execution of the release. The Fifth Circuit

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[5] The releases in dispute in the *Ingram* case provided:

> [Plaintiff] has remised, released, and forever discharged, and by these presents does, for itself and for its successors and assigns, remise, release and forever discharge [Defendant] and each and every one of [its] past and present officers, directors and stockholders and each of them, and their respective heirs, executors, administrators, successors and assigns, of and from all manner of actions, causes of actions, suits, debts, dues, sums of money, accounts, reconings [sic], bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, controversies, Judgments, executions, claims and demands whatsoever in law, in admiralty, or in equity which against them or any of them, [Plaintiff] or its successors or assigns hereafter can, shall or may have, in its own right or in a representative capacity, for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of these presents, including without limitation of the generality hereof, any past, present or future claims, matters, causes or things that [Plaintiff] has or may hereafter have arising out of, based upon or in any way relating to the Purchase Agreement, the Subcontract Agreement, and the Agreement regarding INGRAM DERRICK BARGE NO. 6, dated November 16, 1971, by and between [Plaintiff] and [Defendant] . . . and the transactions contemplated thereby, ...

Ingram Corp., 698 F.2d at 1311.

affirmed summary judgment in favor of defendants, stating:

> When a release provides that "any and all claims," "past, present, or future" are to be extinguished, a court is required to enforce its provisions both as to known and unknown claims. A contrary result would not contribute significantly to the public policy of encouraging the settlement of differences and compromise of disputes in which the execution and exchange of releases is the common and legally accepted means of consummation.

Id. at 1312. Defendants' argue that *Ingram,* a case much more complex than the instant matter, supports their request for summary judgment based upon the fact that Plaintiffs previously signed releases which unambiguously released Defendants from all claims, known or unknown, existing at the time of the execution of the 1999 Buyout Agreements.

Conversely, the Piper Plaintiffs maintain that they "did not waive the breach of fiduciary claims and the litany of other breaches of the partnership agreement by the defendants." Record Document 376 at 10. The Piper Plaintiffs argue that because the subject complaints relate to breach of fiduciary obligations and duties and because they did not learn of such claims until 2004 and/or after the institution of the instant lawsuit, the express release and waiver in

the 1999 Buyout Agreements is not applicable.[6] Specifically, the Piper Plaintiffs point to two Louisiana cases, *W.A. McMichael Const. Co. v. D & W Properties, Inc.*, 356 So.2d 1115 (La.App. 2 Cir. 1978) and *Barksdale v. Lincoln Builders, Inc.*, 32,857 (La.App. 2 Cir. 6/21/00), 764 So.2d 223. The Piper Plaintiffs rely on *W.A. McMichael Const. Co.* for the following principle:

> The fiduciary duty of the partners is particularly applicable when one partner seeks to purchase the interest of another partner. Such a sale will be sustained only when it is made in good faith, for a fair consideration, and on a full and complete disclosure of all important information as to value. This duty of disclosure holds true despite the fact that the relations between the partners have become strained or in conflict. The fiduciary duty continues through the sale or purchase of a partner's interest or through termination and liquidation of the partnership.

W.A. McMichael Const. Co., 356 So.2d at 1122. *W.A. McMichael Const. Co.* is also cited by the Piper Plaintiffs for the reasoning that "whether based on fraud, presumptive or constructive fraud, error, or equitable principles, Louisiana courts have consistently set

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[6] Piper stated that he first learned of the alleged fraudulent activities of Binion and alleged breaches of fiduciary obligations by Binion during discussions with Jamie Perdigao in July 2004 and/or after the institution of the instant lawsuit. *See* Record Document 376 at 11.

aside transactions or otherwise afforded effective relief where a fiduciary secured an unfair advantage by failure to disclose material information to the principal's detriment." *Id.* at 1124. The Piper Plaintiffs rely on *Barksdale* to argue that a partner who does not have knowledge of breaches of fiduciary duties lacks the requisite intent to release the fiduciary for the prior breaches of duties and the fiduciary may not profit by such a release. *See* Record Document 376 at 22.

Based on the aforementioned jurisprudence, the Piper Plaintiffs argue that the release and waiver in the 1999 Buyout Agreements is not effective as to their claims for breach of fiduciary duty. Such argument is based on their belief that Binion knew, and they did not, that "the $12 million total price he paid for plaintiffs' 8.08[%] interest in the Horseshoe was unfair and wrong" and because "Binion breached his fiduciary obligation by mortgaging their property without their consent and spending their money for matters wholly unrelated to Plaintiffs." Record Document 376 at 20, 23.

The Court has closely scrutinized the Piper Plaintiffs' argument with respect to the interplay between the release and waiver language in the 1999 Buyout Agreement and their claims for breach of fiduciary duties. It appears to the Court that the Piper Plaintiffs' are essentially attempting to void the release and waiver due to purported unfair dealings on the part of Binion. Yet, this Court finds that in light of the substantial monetary consideration paid

(and accepted) without reservation for such release and waiver, the Piper Plaintiffs are still bound by the release and waiver provision in the 1999 Buyout Agreement.

With respect to the strong public policy favoring compromise agreements, this Court echos the sentiments of the *Ingram* court and believes that embracing the Piper Plaintiffs' argument would undermine that policy. The Court also notes another provision of the 1999 Buyout Provision that supports its finding that the Piper Plaintiffs are bound by the release and waiver. Paragraph 10 states, in pertinent part, that "the Pipers specifically waive any objection or claim arising as a result of, or in any way related to, the efforts of Binion or the Horseshoe Companies to purchase or finance additional gaming or related operations including but not limited to gaming and related operations in Hammond, Indiana or Joliet, Illinois." Record Document 314, Exhibit 2, ¶ 10. This provision further evidences the intent of the parties with respect to the compromise and release and that such release was to include any and all claims, causes of action or demanded relating to events, known or unknown, occurring prior to April 21, 1999.

Further, the Court agrees with Defendants that the cases of *W.A. McMichael Const. Co.* and *Barksdale* are factually distinguishable from the instant case. In the former case, the managing general partner did not disclose an important lease agreement which he had in hand and explained his failure to disclose with the flippant comment of "I was

out there to buy them out, not to given them a progress report." *W.A. McMichael Const. Co.,* 356 So.2d at 1119. In *Barksdale,* the Court was concerned that the limited partners did not understand the significance of the general partners' actions which jeopardized the financial well-being of the partnership. *See Barksdale,* 764 So.2d 223. Here, all Plaintiffs admit that the 1999 Buyout Agreements were entered into after several months of negotiations and there is no competent summary judgment evidence indicating that Binion had superior knowledge or information. Again, the Court considers the business acumen of not only Binion, but also Robert Piper, a licensed Louisiana attorney actually representing Horseshoe and who was well versed in the casino and gaming industry. Robin also admitted in his deposition that the Buyout Agreement was negotiated, that he was involved in the negotiations, and that felt that "the partnership agreement gave us [the Plaintiffs] a lot of strength in negotiating the buyout." Record Document 314, Exhibit 8 at p. 113-114.

Finally, the Court considered the multiple claims, which were in most instances very specific, made by Plaintiffs constantly alleging wrongdoings of Defendants over virtually the entire course of their ownership in Horseshoe Entertainment, L.P. Such repetitive and virtually unceasing claims strongly evidence that the Piper Plaintiffs were clearly aware of many claimed wrongdoings, including alleged violations for the partnership covenants, and after months of negotiations and bargaining, voluntarily

waived any and all claims based on the alleged mismanagement or claimed wrongdoings.

Accordingly, the Court finds that summary judgment in favor of Defendants is appropriate and any claims that existed as of April 21, 1999, including claims for breach of fiduciary duties and obligations, are dismissed.[7] Plaintiffs signed releases which unambiguously released Defendants from all claims, known or unknown, existing at the time of the execution of the 1999 Buyout Agreements. The language of those releases is clear and should be given its intended effect.

2. Claims of Fraud in Inducement and of Misrepresentation.

At the outset, the Court notes that the aforementioned ruling on the release and waiver issue includes Plaintiffs' claims for fraud, as such claims existed as of April 21, 1999. However, out of an abundance of caution, this Court will engage in analyzing the merits of the fraud claims.

Plaintiffs allege that Binion made misrepresentations to them to induce them to sell and that he misrepresented the value of Horseshoe Entertainment, L.P. when they sold their interest in that

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[7] Such ruling necessarily requires that the Piper Plaintiffs' request for judgment sua sponte with respect to the issues of fact relating to Binion's fiduciary duties, which is contained in Record Document 376 at 76-78, be **denied**.

company. Defendants have moved for summary judgment on these claims of fraud in inducement and of misrepresentation on the grounds that there was no fraud and, alternatively, that any fraud claims are prescribed.

Fraud is "a misrepresentation or suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other." La. C.C. Art. 1953. Fraud requires a showing of intent. *See St. Paul Mercury Ins. Co. v. Williamson,* 224 F.3d 425 (5th Cir. 2000); *Pellerin Const. Inc. v. Witco Corp.,* 169 F.Supp.2d 568 (E.D.La. 2001). "Negligence is, in no sense, the synonym of fraud or dishonesty." *Anders v. J.L. Evans & Co.,* 187 So. 109, 111 (La.App. 2 Cir. 1938).

Plaintiffs first fraud claim is based on their belief that Binion lied to them about his need to buy their interest in Horseshoe Entertainment, L.P. and thereby committed fraud. But, the undisputed record evidence is that Binion received information from representatives of the Indiana and Illinois regulatory bodies that he would not obtain regulatory approval in Indiana and Illinois if Plaintiffs continued to be his partners in Louisiana. *See* Record Document 314, Exhibit 9 at pp. 138-140. This evidence is supported by the First Amendment to the Empress Merger Agreement, which added a provision requiring Cassandra and Wendell Piper's and Robin's limited partnership interests be purchased by Horseshoe no later than May 31, 1999 or Empress would terminate the agreement and Horseshoe would lose its $10

Million deposit. *See id.*, Exhibit 12 at 2, 4. Plaintiffs have not shown, and would be hard pressed to show, a genuine issue of material fact on the issue of whether Binion lied to them about his need to buy their interest in Horseshoe Entertainment, L.P., as they have no testimonial or documentary evidence that disputes Binion's stated belief that he would not obtain regulatory approval in Indiana and Illinois if Plaintiffs continued to be his partners in Louisiana. In fact, the only competent summary judgment evidence on this issue, *i.e.*, the First Amendment to the Empress Merger Agreement, unequivocally supports Binion's position.

The second fraud claim alleges that Binion misrepresented the value of Horseshoe Entertainment, L.P. when Plaintiffs sold their interest in that company. To prevail on a claim of fraudulent misrepresentation, the plaintiff must demonstrate "material misrepresentations committed by one party with the design to deceive another to obtain an unjust advantage or to cause loss or inconvenience to the other." *Murphy's Lease & Welding Service, Inc. v. Bayou Concessions Salvage, Inc.*, 2000-978 (La.App. 3 Cir. 3/8/01), 780 So.2d 1284, 1288 (La.App. 3 Cir.,2001). The plaintiff must establish both an intent to defraud or gain an unfair advantage and resulting loss or damage. *See id.*

Again, as to the second fraud claim, the Piper Plaintiffs have not shown, and are unable to show with competent summary judgment evidence, that Binion or any of the other Defendants misrepresented

the value of Horseshoe Entertainment, L.P. Further, under Louisiana law, "misrepresentation does not vitiate consent when the party against whom the fraud was directed could have ascertained the truth without difficulty, inconvenience, or special skill." *Sonnier v. Boudreaux,* 95-2127 (La.App. 1 Cir. 5/10/96), 673 So.2d 713, 718 (citations omitted). Here, Robert Piper was a sophisticated businessman, a practicing attorney, and was Horseshoe Entertainment, L.P.'s local general counsel. Robin was also a sophisticated businessman and had served as a consultant to Binion in Louisiana and assisted in Horseshoe's pursuit of gaming opportunities in other states. Based on their work experiences dealing with legal and financial matters, this Court finds that these Plaintiffs had the opportunity and the ability to determine, for themselves, the approximate fair market value of the interests they were selling. Along these same lines, Plaintiffs' attempt to prove unfair advantage and resulting loss or damage is questionable, as their powerful negotiating position under the Piper-drafted partnership agreement, enabled them to likely extract significantly more than the fair market value of their limited partnership interests in Horseshoe Entertainment, L.P. as well as a five year Participation Clause. *See* Record Document 314, Exhibit 17 (Expert Report of Houlihan Lokey Howard & Zukin) & Exhibit 16 (Affidavit of Sandy Purcell, the Review Appraiser for Houlihan Lokey Howard & Zukin) (The reports evidence that Plaintiffs received more than the fair market value of their interests in Horseshoe Entertainment, L.P. when they sold their

interests. The Houlihan Lokey report shows that the 8.08% equity interest in Horseshoe Entertainment, L.P. owned by Plaintiffs had a fair market value on April 21, 1999 of $9,914,160.00, far less than the amount Plaintiffs actually received in the Buyout Agreements).

Finally, the Court does note that in response to Defendants' well plead Motion for Summary Judgment, the Piper Plaintiffs contend that "the salient issue is whether the defendants induced the plaintiffs to get out on the basis of a promise to pay them more down the road." Record Document 376 at 25. Further, they maintain that "it is clear that the sole inducement to plaintiffs to agree to the buyout was the promise of future payments under the Most Favored Nations Clause. . . . But for plaintiffs desire to assist him [Binion] in this endeavor [pursuing deals in other jurisdictions] and because of his promise to make sure they were paid what was due upon the sale of Horseshoe, plaintiffs would have never agreed to the buyout." *Id.* at 28. Plaintiffs' response is unpersuasive. Any oral promise from Binion for future payments would have been superseded by the 1999 written Buyout Agreements, which include the Participation Clause. Further, the Piper Plaintiffs have not pointed to any competent summary judgment evidence that Binion committed the fraud alleged. Likewise, the Piper Plaintiffs have not pointed to any admissible evidence to create a genuine issue for trial regarding Binion's intent to honor his agreement under the Participation Clause. At this stage in the

litigation, conclusory allegations are simply not enough. Accordingly, summary judgment in favor of Defendants is granted as to Plaintiffs' fraud claims.[8]

3. Oral Contract Claim.

As part of their amending complaint, Plaintiffs allege that sometime after entering into their Buyout Agreements, Binion made an oral promise to buy out the Most Favored Nations Clause of their Buyout Agreements. *See* Record Document 91, ¶ 20(E). Plaintiffs contend that such oral promise was not contingent upon the sale of the business. *See id.* Plaintiffs also allege that Binion agreed to pay them $3.6 million based on the sale of the Illinois casino and "another sum upon the sale of the three (3) remaining casinos under the favored nations agreement." *Id.*, ¶ 20(C). Plaintiffs allege that the aforementioned sum was not paid because "Binion decided to wait until an accurate valuation could be made of the other three (3) vessels at which time a lump sum

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[8] Further, the Court also concludes that Plaintiffs' fraud claims are prescribed. Plaintiffs had asserted the fraud claims many times over the years prior to the April 21, 1999 Buyout Agreements. In Louisiana, the prescriptive period for actions based on fraud is one year from the date the injury or damage is sustained. *See* La. C.C. Art. 3492. Plaintiffs obviously knew about their allegations of fraud prior to April 1999 and they have no credible basis now for arguing suspension or interruption of the prescriptive period. Thus, Plaintiffs' fraud claims related to actions which allegedly took place before Plaintiffs sold out not only have been released, they have also prescribed.

payment would be made reflecting the value of all four (4) casinos." *Id.*, ¶ 20(D).

According to Robert Piper's deposition testimony, he believed that Binion was going to buy out the Most Favored Nations Clause, even if there was not a sale, due to conversations he had with Binion and other representatives of Defendants. *See* Record Document 314, Exhibit 4 at pp. 89-92. Robert Piper admitted in his deposition that there was no written agreement concerning Binion's oral promise to buy out the Most Favored Nations Clause. *See id.*

Conversely, Robin testified during his deposition that he would not have negotiated with Lacy Johnson, one of the Defendants' representatives Robert Piper claimed to have a conversation with regarding Binion's oral promise to buy out the Most Favored Nations Clause. *See id.*, Exhibit 5 at p. 60. Robin stated that he dealt with Binion only. *See id.* at p. 61. When asked if Binion ever offered to pay him $3.6 million (or $1.6 million to the Pipers and $1.6 million to Robin), Robin stated that if Binion did, he did not agree to it and he would never have agreed to accept such sums for a buy out of the Most Favored Nations clause. *See id.* at p. 62. And while Robin testified that Binion told him he would buy out the Most Favored Nations provision, he could not recall when those promises were made. *See id.* at pp. 65-66. Significantly, Robin testified that Binion did not offer a price because "I don't think he knew at the time." *Id.* at p. 66.

Binion himself recalled that Plaintiffs expressed a desire to "get their money early on not waiting for the Most Favored Nations clause to be triggered by a sale." *Id.*, Exhibit 9 at p. 250. Binion also conceded that the $1.8 million figure had been discussed, but that he thought this was in reference to "the buyout for the whole thing," as compared to Robert Piper's desire to "do a partial buyout of [the Buyout Agreement]." *Id.* at p. 252. Binion further testified that no buyout ever "came to fruition." *Id.*

Defendants argue that summary judgment is appropriate on the oral promise claim on several grounds: (1) Plaintiffs cannot carry their burden of proving the existence of the alleged oral promise by Binion under Louisiana Civil Code Article 1846 and (2) the oral promise claim fails because Plaintiffs cannot establish two essential elements for formation of a contract – price and consent. *See* Record Document 314 at 27-30.

The Piper Plaintiffs argue that summary judgment is inappropriate[9] and maintain that "the commitment made by Mr. Binion is clear and unambiguous; and the reason for the commitment is clear and unambiguous. Consistent therewith, the promise must necessarily be enforced." Record Document 376 at 42. They contend that "it is indisputable

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[9] Plaintiff Robin made no response to the portion of Defendants' Motion for Summary Judgment relating the oral promise claim.

that an oral contract existed between the parties" and place great weight on the fact that it was Binion's "custom and practice to operate via verbal commitments and agreements sealed with a handshake." *Id.* at 46.

The Court disagrees and finds, as a matter of law, that there was no enforceable oral contract for Binion to buy out the Plaintiffs' interest in the Most Favored Nations provision. Louisiana Civil Code Article 1846 applies to the Piper Plaintiffs' claim of an oral contract with Binion. Article 1846 states:

> When a writing is not required by law, a contract not reduced to writing, for a price or, in the absence of a price, for a value not in excess of five hundred dollars may be proved by competent evidence.
>
> If the price or value is in excess of five hundred dollars, the contract must be proved by at least one witness and other corroborating circumstances.

The second paragraph of Article 1846 governs in the instant case. The Piper Plaintiffs designate Binion as their "one witness" and argue that their "other corroborating circumstances are evidenced by the plaintiffs' admissions that they did not want out of the deal, but that they only got out to assist in the acquisition of the Empress property." Record Document 376 at 45. They also rely on a letter from Binion's attorney to Evan Migdail. *See id.* at 44. According to the Piper Plaintiffs, the letter states that Horseshoe

and Robin are in the process of negotiating a buyout of Robin's rights under the Most Favored Nations Clause and it is anticipated that an agreement will be finalized shortly. *See id.*[10]

The Piper Plaintiffs' reliance on Binion as their "one witness" is misplaced, as he unequivocally testified that although there were discussions with Robert Piper regarding a buyout, those discussions never reached fruition. *See* Record Document 314, Exhibit 9 at p. 252. Thus, Binion's testimony is not supportive, but rather contradictory to an enforceable oral contract under Louisiana law. And while corroborating evidence under Article 1846 may be general and need not prove every detail of the plaintiff's case, the evidence must in some way corroborate the allegations of the Piper Plaintiffs. *See Hall v. Turner,* 500 So.2d 853, 855 (La.App. 1 Cir. 1986). Here, after a careful examination of the record, the Court simply does not find the existence of any "other corroborating circumstances" to the extent that the requirement of Article 1846 is fulfilled. *See id.* For instance, Plaintiffs seem to offer Binion's claimed routine business practice of handshake agreements as a corroborating circumstance, but this Court finds that such practice is not the type of evidence envisioned by Article 1846 and is irrelevant to the legal determination presently before this Court. Likewise, even what at first glance appears to be the Piper Plaintiffs' most reliable

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[10] The letter is referenced as Exhibit 82.

evidence – the letter which references negotiations which anticipated a buyout agreement in the future – is not corroborative. It simply parallels Binion's testimony of negotiations regarding a possible buyout of the Most Favored Nations Clause. It does not support the conclusion that such an agreement was completed and/or is enforceable. The same rationale applies to the other claimed corroborating circumstances offered by the Piper Plaintiffs.[11]

Further, independent of the analysis under Article 1846, this Court also doubts the Piper Plaintiffs' ability to establish the required elements of price and consent as to Binion's alleged oral contract to buyout the Most Favored Nations provision. At trial, the Piper Plaintiffs would bear the burden of proof in establishing an enforceable oral contract. Thus, to avoid summary judgment, they must demonstrate a genuine issue of material fact on the issues of price and consent. Under Louisiana Civil Code Article

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[11] The Court points to Paragraph 24 of the Piper Buyout Agreement, which states:

> 24. *Modification.* This Agreement may not be amended, modified or altered except by written instrument duly executed by all of the parties hereto.

Record Document 314, Exhibit 2 at 7. The Piper Buyout Agreement also contains an integration clause that unquestionably incorporates all of the terms of the agreement among the parties on the subjects addressed, including the Most Favored Nations Clause. The Court finds that such provisions are in direct contravention of Plaintiffs' claim that an oral contract/promise made by Binion existed and that such oral contract modified the provisions of the Most Favored Nations Clause.

2439, the basic requirements for the existence of a contract are: (1) the thing; (2) the price; and (3) the consent of the parties. The latter two requirements are inter-connected. In the absence of an agreement as to price, there is no consent, and no contract that can be given legal effect. *See First Nat. Bank of Ruston v. Mercer,* 448 So.2d 1369 (La.App. 2 Cir. 1984).

Here, the Piper Plaintiffs admit that no price had been determined. In their opposition brief, they state:

> [T]he most favored nations' provision in the absence of a sale of business, had a value which had to be discounted. The parties ***were looking to reach a valuation*** with an appropriate discount. Before they could do so, Binion reached an agreement to sell the business to Harrah's.

Record Document 376 at 44 (emphasis added). Robin also testified in his deposition that Binion did not offer a price for the buy out because "I don't think he knew [a price] at the time." Record Document 314, Exhibit 5 at p. 66. With these admissions, it is clear that no agreement as to price was ever reached in connection with a complete buy out of Plaintiffs' rights under the Most Favored Nations Clause. With no agreement as to price, it naturally follows that the parties could not consent. Thus, there was never an enforceable oral contract for Binion to buy out the Plaintiffs' rights under the Most Favored Nations Clause.

Based on the foregoing analysis, the Court finds that summary judgment in favor of Defendants is appropriate as a matter of fact and law as to Plaintiffs' oral contract claim.[12]

4. Interpretation of the Harrah's/ Horseshoe Stock Purchase Agreement.

Defendants and Plaintiff Robin disagree as to whether the Harrah's/Horseshoe Stock Purchase Agreement, signed on September 10, 2003, was a contract of sale or a contract to sell and whether such purchase agreement triggered the Participation Clause/Most Favored Nations Clause in the 1999 Buyout Agreements. All parties seem to agree the aforementioned issues present questions of law that can be decided at the summary judgment stage.

The Robin Buyout Agreement was entered into by Defendants and Robin on April 21, 1999. *See* Record Document 314, Exhibit 3, ¶ 6. Paragraph 6 of the Robin Buyout Agreement contains what is referred to as a Participation Clause or a Most Favored Nations Clause, which states:

> *Participation in Sale by Binion.* If, within five years of the date of this Agreement, the Binion Family Interests collectively sells in

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[12] In their opposition brief, the Piper Plaintiffs also reference their detrimental reliance claim, which is addressed in another ruling by this Court.

> excess of a 50% interest in Horseshoe Gaming, LLC, for a purchase price consisting of cash, debt or publicly traded securities or any combination thereof having a value of in excess of $5,350,000 per 1% interest sold, then Duke [Robin] shall receive a cash sum equal to 2 1/4% of the value of the sale in excess of $5,350,000 per 1% sold (such cash sum equal to 2 1/4% being the "Participation Payment"). For the purposes of this paragraph, the value of the sale shall be equal to (i) the cash purchase price, plus (ii) 80% of the value of the publicly traded securities as determined by the last sales price of such securities at the close of the market upon which such securities are traded, on the date the Binion Family Interests receives such securities, plus (iii) 80% of the present value of the debt. For the purposes of this paragraph, the Binion Family Interests shall mean, Binion or any entities owned or controlled by Binion, or any member of his family or any trust for the benefit of any member of his family. In the event that Duke [Robin] is entitled to the Participation Payment, all sums due from Duke [Robin] to Horseshoe Companies shall be due and payable immediately to the extent of the Participation Payment.

Id. An identical provision is also contained in the Piper Buyout Agreement.

The Harrah's/Horseshoe Stock Purchase Agreement was entered into by Harrah's Entertainment, Inc., HGHC, and each of the stockholders of HGHC

on September 10, 2003. *See id.*, Exhibit 14. The Stock Purchase Agreement contains the following language at Section 1.2:

> *Closing.* Unless this Agreement has been terminated pursuant to Section 8. 1, upon the terms and subject to the conditions set forth in this Agreement, the purchase and sale of the Shares (the "Closing") shall take place at 10:00 a.m., California time, on the third business day after the satisfaction or (to the extent permitted by applicable law and this Agreement) waiver of the conditions set forth in Article VII (other than those conditions to be satisfied or waived at the Closing), at the offices of Latham & Watkins LLP, 650 Town Center Drive, 20th Floor, Costa Mesa, California 92626, or at such other time, date or place agreed to in writing by Parent and the Company. The date on which the Closing occurs is referred to in this Agreement as the "Closing Date."

Id., § 1.2. The Closing Date as referred to in Section 1.2 of the Stock Purchase Agreement occurred on July 1, 2004. *See id.*, Exhibit 15. Five years from the date of the Robin Buyout Agreement, *i.e.*, April 21, 1999, would be April 21, 2004.

There is no dispute that July 1, 2004, the closing date, was outside of the five year window of the Most Favored Nations Clause. Thus, the issue becomes whether the Stock Purchase Agreement, which was entered into during the five year window, was sufficient to trigger the Most Favored Nations Clause.

Both Plaintiffs and Defendants have presented expert evidence on this precise issue.

Plaintiff Duke Robin has presented the expert opinion of Louisiana State University Law Professor Saul Litvinoff, who opined that the Stock Purchase Agreement was a contract of sale. Notwithstanding, Professor Litvinoff stated that "the issue of whether the Stock Purchase Agreement [was] classified as a sale or a contract to sale [was] nothing more than a red herring, since under either approach Robin is entitled to a price supplementation under the participation clause of the 1999 Agreement." Record Document 369, Exhibit 9. Professor Litvinoff concluded that the word "sells" in the Participation Clause encompasses both a contract of sell and a contract to sale. *See id.*

Defendants have presented the expert opinion of Tulane University Law Professor Vernon Palmer, who opined that the Stock Purchase Agreement of September 10, 2003 was a contract to sell and that the Most Favored Nations Clause would only be triggered by an actual sale, not a mere contract to sell. *See id.*, Exhibit 6. Thus, he concluded that the conditions of the Most Favored Nations Clause were not satisfied within the required 5 year period and that no participation payment was owed to Robin. *See id.*

The Court found that the dueling experts were helpful in their debate of the fine points of Louisiana obligations law. Nonetheless, the Court has performed its own legal analysis. The word "sells" in

Paragraph 6 is undefined and the Court must turn to Louisiana obligations law for guidance. Louisiana law draws a bright-line distinction between a contract to sell and a contract of sale. Louisiana Civil Code Article 2623 states that "an agreement whereby one party promises to sell and the other promises to buy a thing at a later time, or upon the happening of a condition, or upon performance of some obligation by other party, is a bilateral promise of sale or contract to sell." Louisiana Civil Code Article 2439 states that a "sale is a contract whereby a person transfers ownership of a thing to another for a price in money." Louisiana jurisprudence reflects that an agreement to sell is not a sale where the execution of a later final act of sale is contemplated by the parties. *See Webb v. Young,* 338 So.2d 767 (La.App. 4 Cir. 1976). Federal courts sitting in Louisiana have also noted that "Louisiana law is long and uniform to the effect that a contract to sell at a future time is not a sale. . . ." *Hillhaven Corporation v. Schweiker,* 570 F.Supp. 248 (M.D. La. 1983).

Here, the Court has examined the plain language of Paragraph 6 of the Buyout Agreements and finds that the language contemplates and describes an actual sale, not a mere contract to sell. For instance, Paragraph 6 sets forth a specific method for determining the "value of the sale" and such method requires the sale to have actually occurred. Hence, the valuation of the "Participation Payment" cannot even be determined unless a "sale" in fact occurred. Moreover, Paragraph 6 states that the transfer must

have "a value of in excess of $5,350,000 per 1% sold," which again leads this Court to the conclusion that the parties intended that an actual sale must occur within the five year time period to trigger the Participation Payments.

Because the Court has found that the language used in the Participation Clause is clear and unambiguous, no further interpretation of the Participation Clause is permitted in search of the parties' intent. *See* La. C.C. Art. 2046 (stating that "when the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent."); *see also Hawco Manufacturing Co., Inc. v. Superior Chain, Inc.*, 1998-1037 (La.App. 1 Cir. 9/24/99), 754 So.2d 1062, 1066, and *Ransom v. Camcraft, Inc.*, 580 So.2d 1073, 1077 (La.App. 4 Cir. 1991). The words, and the context of such words, of Paragraph 6 refer to an actual sale, and this Court will not create ambiguity where none exists. Further, the Court believes that interpreting the Participation Clause in a way that would allow a contract to sell in the future to trigger the Participation Clause would be a perversion of the express language contained in Paragraph 6.[13]

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[13] Plaintiff Robin relies on Paragraph 22 of the Buyout Agreement in support of his contention that "the acceptance of a bona fide offer to purchase" would trigger the Participation Clause/Most Favored Nations Clause. Record Document 369 at 8. Paragraph 22 provides, in pertinent part, that "within thirty (30) days of acceptance of a bona fide offer to purchase in excess

(Continued on following page)

Further, the Court finds that the Stock Purchase Agreement of September 10, 2003 was a contract to sell under Article 2623, not a contract of sale under Article 2439. In making this ruling, the Court was most impressed by Sections 1.1 and 1.2 of the Stock Purchase Agreement. Section 1.1 states that "Parent agrees to purchase from each Seller and each Seller agrees to sell to Parent. . . ." Record Document 314, Exhibit 14, § 1.1. Section 1.2 provides that "the purchase and sale of the Shares (the 'closing') shall

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of 50% of the ownership of Horseshoe Gaming, LLC, Horseshoe Gaming, LLC shall provide Duke [Robin] with a copy of such bona fide offer, except as prohibited by an confidentiality agreement imposed or required by the offer." Under Louisiana Civil Code Article 2050 (each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole), Robin argues that the "bona fide offer" language should be extended to Paragraph 6.

The Court disagrees. Paragraph 22 is more of a catch-all provision and nothing in the aforementioned language provides or suggests that a "bona fide offer" will trigger the Participation Clause. Rather, the only obligation that results from the quoted language of Paragraph 22 is a notice obligation in that Defendants must provide a copy of the bona fide offer to Robin. Further, the parties were free to include "bona fide offer" language in the Participation Clause. Yet, based on the plain language of that clause, the parties clearly chose not to include such a phrase.

Robin also relies upon Section 3.3(b) for principle that the Stock Purchase Agreement itself refers to the Participation Clause of the April 21, 1999 Buyout Agreement. *See* Record Document 369 at 16-17. Yet, such reliance is misplaced as the Section 3.3(b) referenced by Robin is actually part of the Disclosure Letter, not the Stock Purchase Agreement.

take place on the third business day after the satisfaction or . . . waiver of the conditions set forth in Article 4. . . ." *Id.*, § 1.1. Such provisions clearly suggest a contract to sell, as compared to a contract of sale. The record evidence establishes the Stock Purchase Agreement was a contract preparatory to the actual sale of the HGHC stock. The agreement sets forth many conditions that had to be satisfied or waived before the sale could close and also provided numerous circumstances under which the parties could terminate the agreement. These are the classic characteristics of a contract to sell, as the agreement evidenced a promise to sell and a promise to buy a thing (stock) at a later time. Based on this reasoning, the Court concludes that the September 10, 2003 Stock Purchase Agreement between Harrah's and HGHC was a preliminary contract to sell, not a sale with suspensive conditions. Moreover, because the closing date of such agreement occurred on July 1, 2004, there was no actual sale sufficient to trigger the Most Favored Nations Clause on or before April 21, 2004.

Accordingly, the Court finds as a matter of law that the Participation Clause/Most Favored Nations Clause requires an actual completed sale; that the September 10, 2003 Stock Purchase Agreement was a contract to sell, not a contract of sale; and that the July 1, 2004 closing of the Stock Purchase Agreement, which did constitute a sale, occurred outside of the five year window of the Most Favored Nations Clause. Hence, no Participation Payments are due to

Plaintiffs from Defendants under the Most Favored Nation Clause and summary judgment in favor of Defendants is granted.[14]

5. Rescission of Buyout Agreements.

In their complaint, Plaintiffs seek a judicial declaration that they are the current owners of their limited partnership interests in Horseshoe Entertainment, L.P. because approval of the Buyout Agreements by the Louisiana Gaming Control Board ("LGCB") was required but never obtained. *See* Record Document 1, ¶¶ 23-25. Defendants have moved for summary judgment on this claim. The parties do not dispute that Defendants, through their then legal counsel, filed a Petition to Modify Ownership with LGCB on September 27, 1999 which requested approval of the Buyout Agreements. Likewise, there does not appear to be a dispute that an accompanying cover letter dated September 23, 1999 asked that the request be placed on the Board's agenda and considered together with Horseshoe's license renewal hearing. Such cover letter contained two signatures, one of which was Robert Piper's.

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[14] The Court is cognizant of the fact that its ruling is consistent with the opinion of defense expert, Professor Palmer. But again, the Court notes that conflicting views of the experts was helpful in examining certain portions of Louisiana obligations, but the Court nonetheless performed its own legal analysis independent of the expert opinions.

Later, in March 2000, Defendants filed an Amended Petition to Modify Ownership with the LGCB.

In support of their position that rescission of the Buyout Agreements is inappropriate, Defendants point to a LGCB hearing held on March 18, 2003 regarding the Horseshoe Entertainment license renewal. According to Defendants, the transcript of such hearing demonstrates that the LGCB was well aware of the Buyout Agreements and, interestingly, the Piper Plaintiffs have not challenged this point. Defendants further note that up until the filing of the instant lawsuit, Plaintiffs have always acted as if the Buyout Agreements were valid. In fact, Plaintiff Robert Piper's signature can be seen on many filings submitted to the LGCB asking for approval of the Buyout Agreements months and months after the transactions were consummated in April 1999. Further, on June 9, 2004, Plaintiff Robin filed an objection with LGCB regarding the Harrah's purchase of Horseshoe. *See* Record Document 314, Exhibit 6, Tab T (Exhibit 192 at ¶ 12). In that objection, he stated:

> The Buyout Agreement was specifically approved by this Honorable Board and is clearly in keeping with the public policy of the statute governing gaming in the State of Louisiana.

Id.

This Court is not challenging the plain language of certain Louisiana statutes, namely La. R.S. 27:68(B) & (E). Section 68(B) states, in pertinent part:

> [T]he sale, assignment, transfer, pledge, or disposition of a security or securities which represents five percent or more of the total outstanding shares issued by a corporation that holds a license is conditional and ineffective if disapproved by the division.

Section 68(E) states, in pertinent part:

> [A]fter a license is granted, any person acquiring five percent or more in the total outstanding shares of a licensee or a five percent or more economic interest in a licensee is required to obtain the division's approval prior to such transaction. Failure to obtain division approval of a transfer is grounds for license revocation.

The plain language of Section 68(B) provides that the disposition of an interest in a casino licensee is ineffective if *disapproved* by the Division. In this case, there is no dispute that the Division, now the LGCB, never disapproved the April 21, 1999 transfers by Plaintiffs. Section 68(E) provides that a person acquiring five percent or more in interest must obtain the Division's approval prior to such transaction. In this case, while there is no dispute that the LGCB was well aware of the 1999 Buyout Agreements, the LGCB never expressly approved the 1999 transfer.

Yet, under Section 68(E), the only sanction for failing to obtain the approval is license revocation.[15] Nothing in the statute suggests that an acquisition without express LGCB approval vitiates the transfer itself. Thus, under the aforementioned Louisiana statutes, there is no valid claim for rescission or voiding the Buyout Agreements. And other than making an argument based in Louisiana public policy, the Piper Plaintiffs have cited no evidence or law in support of their position that the April 21, 1999 Buyout Agreements should be rescinded because Defendants allegedly did not receive appropriate approval from the Louisiana Gaming Control Board.

Further, Louisiana law forbids relief to a claimant who, through his own acts or omissions, causes the problem about which he complains. *See e.g., Standard Life and Accident Insurance Company v. Pylant, et al.*, 424 So.2d 377 (La.App. 2d Cir. 1983) (stating that "it is well settled that our law does not allow one to profit from his own wrongdoing. . . ."). Here, Plaintiff Robert Piper, a licensed Louisiana attorney who served as local general counsel for Horseshoe Entertainment, L.P., failed to follow up on the original and amended petitions filed with LGCB. His failure is in many ways fatal to Plaintiffs' claim that the Buyout Agreements should be rescinded, as he should not benefit from his failure to act, which

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[15] In the years since the 1999 transfers, the LGCB has not revoked nor sought to revoke Horseshoe Entertainment's license.

quite possibly contributed to the LGCB's failure to formally approve the 1999 transfers. This "doctrine of unclean hands" is another basis for awarding summary judgment in favor of Defendants on this issue.

Based on the foregoing, summary judgment in favor of Defendants is granted as to Plaintiffs' request to rescind the April 1999 Buyout Agreements based on the LGCB's failure to formally approve such agreements.

6. Claims Under La. R.S. 51:1401.

In Paragraph 29 of their complaint, Plaintiffs allege that "the acts and practices of the defendants . . . constitute unfair and deceptive trade practices within the meaning of La. R.S. 51:1401 et seq." Record Document 1, ¶ 29. Plaintiffs are clearly alleging a violation of the Louisiana Unfair Trade Practices and Consumer Protection Law ("LUTPA" or "the Act"). Section 1405 of the Act states that "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." La. R.S. 51:1405(a). Section 1409 provides a private cause of action under the Act:

> Any person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal, as a result of the use or employment by another person of an unfair or deceptive method, act, or practice declared unlawful by R.S. 51:1405, may bring an

> action individually but not in a representative capacity to recover actual damages. If the court finds the unfair or deceptive method, act, or practice was knowingly used, after being put on notice by the attorney general, the court shall award three times the actual damages sustained. In the event that damages are awarded under this Section, the court shall award to the person bringing such action reasonable attorney fees and costs. Upon a finding by the court that an action under this Section was groundless and brought in bad faith or for purposes of harassment, the court may award to the defendant reasonable attorney fees and costs.

La. R.S. 51:1409(A). Louisiana courts have held that Section 1409 "is apparently penal in nature and subject to reasonably strict construction." *National Gypsum Co. v. Ace Wholesale, Inc.*, 98-1196 (La.App. 5 Cir. 6/1/99), 738 So.2d 128, 130 (citation omitted). Further, the personal right of action under Section 1409 "has been held to apply only to direct consumers or to business competitors." *Id.* (citations omitted).

In their Motion for Summary Judgment, Defendants argue that the relationship between Plaintiffs and Defendants cannot seriously be considered to fall within the category of direct consumer or business competitor. *See* Record Document 314-2 at 42. Defendants further contend that any claim under Section 1409 for any act that occurred more than a year prior to Plaintiffs' filing of their lawsuit on July 27, 2004 has prescribed. *See* La. R.S. 51:1409(E) (stating that

"the action provided by this section shall be prescribed by one year running from the time of the transaction or act which gave rise to this right of action."); *see also Crowe v. Smith,* 848 F.Supp. 1248, 1257 (W.D.La. 1994) (noting Section 1409(e)'s one year peremptive limitations period).

Conversely, the Piper Plaintiffs[16] contend they have standing to sue under the Act because they were business competitors. *See* Record Document 376 at 66. Specifically, the Piper Plaintiffs state:

> The undisputed facts in the record are that the plaintiffs were involved in the gaming industry prior to their involvement with Mr. Binion. Mr. Piper testified that he and his wife were part owners of Southwest Gaming, a video poker entity that they operated in 1992 immediately prior to teaming with Mr. Binion in 1993.
>
> In the roll up of October 1995, Jack Binion and his new entity Horseshoe Gaming, became the competitors of the limited partners. Horseshoe Entertainment lost its identity with the roll up; and plaintiffs lost their ability to influence decisions affecting their business. Horseshoe Gaming became the decision maker and all decisions affecting

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[16] Plaintiff Robin made no response to the portion of Defendants' Motion for Summary Judgment relating the unfair and deceptive practices claim.

> Horseshoe Entertainment were made by Horseshoe Gaming.

Id. at 66-67. Likewise, the Piper Plaintiffs argue that if they were not potential competitors, the Buyout Agreements at issue in this case would not contain non-competition convenants. *See id.* at 73. They further maintain that their claims under the Act are not time barred because "Defendants have withheld information and failed to disclose the fraudulent acts from the Plaintiffs regarding their unfair trade practices." *Id.*

Like Defendants, this Court finds the Piper Plaintiffs' argument that for over four years they were both limited partners and competitors with Horseshoe Entertainment to be bizarre at best. *See* Record Document 394 at 18. Further, that argument is simply unsupported by case law, namely *Tessier v. Moffatt,* 93 F.Supp.2d 729 (E.D.La. 1998). In *Tessier,* the plaintiffs were fourteen of the original thirty-four limited partners and owners of a minority interest in a limited partnership, while the defendants were the managing general partner, the remaining general partners, certain of the limited partners and the managing general partner's counsel. *See id.* at 731-732. The *Tessier* defendants challenged the plaintiffs' standing under the LUTPA, asserting that the plaintiffs were "business partners with the defendants rather than competitors or consumers." *Id.* at 733-734. Conversely, the plaintiffs maintained that "they [were] consumers because they purchased partnership units from the defendants and that they [were]

competitors" because a new limited partnership created by several of the defendants "was in direct competition with [the previously formed limited partnership]." *Id.* at 734. In regards to the plaintiff's claim that they were business competitors, the *Tessier* court stated:

> The plaintiff-partners have not alleged facts to support an allegation that they, as individuals, are business competitors within the meaning of LUTPA. In order to qualify as business competitors, the individual partners must actually or potentially engage in business that competes directly or indirectly with MMP. LUTPA is patterned after the Federal Trade Commission Act, and the language closely tracks 15 U.S.C. § 45(a) of the federal statute. In addressing the meaning of business competitor in the federal statute, the United States Supreme Court has stated:
>
> > It is obvious that the word "competition" imports the existence of present or potential competitors, and the unfair methods must be such as injuriously affect or tend thus to affect the business of these competitors – that is to say, the trader whose methods are assailed as unfair must have present or potential rivals in trade whose business will be, or is likely to be lessened or otherwise injured. *Federal Trade Commission v. Raladam Company*, 283

> U.S. 643, 649, 51 S.Ct. 587, 75 L.Ed. 1324 (1931).
>
> Unlike the individual partners, HMC does meet the definition of competitor because it, like MMP, engages in the business activity of developing and renting medical office space. However, the plaintiff-partners may not bring an action in a representative capacity on behalf of the HMC partnership under LUTPA. . . . Thus, the plaintiff partners do not have standing to bring suit as limited partners or as representatives of the partnership.

Id.

Here, the Court finds that Plaintiffs were not business competitors of Defendants. From 1993 to 1999, Plaintiffs were limited partners, some of the Plaintiffs provided consulting services for Defendants, and Robert Piper served as local general counsel for Horseshoe Entertainment, L.P. for approximately five years. These facts indicate "faithful and successful service" with Defendants, not competition. *Bollinger v. Tanner Companies, LP,* No. Civ.A. 02-3248, 2003 WL 1824836, *1 (E.D.La. April 7, 2003). Further, the *Tessier* decision provides particular guidance in that it deals with limited partners, who claim to be business competitors under the LUTPA, asserting claims against general partners. As in *Tessier,* Plaintiffs, as limited partners, simply have not proved facts to support an allegation that they, as *individuals,* are business competitors of Defendants

within the meaning of the LUTPA. In claiming to be business competitors, Plaintiffs cannot rely on any right they may have in their representative capacity as limited partners to bring such an action. And while Robert Piper testified that he and his wife were "part owners" of Southwest Gaming, a video poker entity that they participated in 1992 immediately prior to teaming with Binion in 1993, such position does not automatically qualify them as business competitors due to the vast differences in the video poker industry and the riverboat casino gaming industry. Plaintiffs offered no proof of the monetary value of their Southwest Gaming interest as compared to the value of their Horseshoe interests. Simply put, any purported unfair and/or deceptive trade practices in relation to the riverboat casino business committed by Defendants would not necessarily injuriously affect or even tend to affect Robert Piper's and/or his wife's involvement in or ability to engage in a business related to video poker.

Notwithstanding, even if this Court assumed for purposes of the instant Memorandum Ruling that the Piper Plaintiffs were business competitors, their claims under the LUTPA are preempted. Plaintiffs did not file the instant lawsuit until 2004, almost ten years after the October 1995 roll up and over five years after the April 21, 1999 Buyout Agreements. Again, Louisiana courts "have consistently held that LUTPA is a peremptive rather than prescriptive statute." *Tessier,* 93 F.Supp.2d at 737. "A peremptive statute . . . totally destroys the previously existing

right with the result that, upon expiration of the prescribed period, a cause of action no longer exists to be enforced." *Pounds v. Schori,* 377 So.2d 1195, 1198 (La.1979). Peremptive statutes do not allow for interruption or suspension; thus, any claim under the LUTPA that arises more than one year prior to filing suit is preempted. *See Tessier,* 93 F.Supp.2d at 737. Thus, Plaintiffs' claims regarding the roll up and loss of identity in 1995 and claims that Binion exploited their partnership interests prior to 1999 are pre-empted since the instant lawsuit was not filed until 2004.[17] Summary judgment in favor of Defendants is appropriate as to Plaintiffs' claims under the LUTPA.

7. The Piper Plaintiff's Claim of Revoked "Comp" Privileges.

Paragraph 15 of Plaintiffs' complaint alleges:

> The Pipers also entered into an oral agreement regarding "comp" privileges at the Horseshoe Casino in Bossier City. . . . Binion orally promised to grant "comp" privileges to the Pipers for as long as Binion was the principal owner of the casino. [T]he comp privileges were revoked shortly after the

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[17] The Piper Plaintiffs made no argument that Defendants engaged in continuing torts that enlarge the period for filing their LUTPA claims. And while the Court could interpret the allegations made as continuing torts from 1995 to 1999, there is no allegation that suggests application of the continuing tort theory past 1999.

> handshake agreement was made. When Robert Piper objected to Binion, Binion caused the privileges to be reinstated, but only for a short period. Thereafter, despite Binion's specific oral agreement to the contrary, the privileges were permanently revoked, all of which caused anguish and embarrassment to the Pipers and a loss of a significant economic benefit.

Record Document 1, ¶ 15. Defendants do not dispute Binion's oral promise for Robert Piper to continue to be "comped" at Horseshoe Bossier after April 21, 1999, so long as Binion was in control. Record Document 314-2 at 43. Yet, Defendants maintain that Binion never revoked those privileges. *See id.* During his deposition, Binion testified (under questioning by Robert Piper) that he was not aware of problems with the Pipers' comps, but that he knew Robert Piper had said there were some problems, meaning that on some occasions there was a "snafu" where the Pipers had to pay for their own meals and/or they had problems getting their meals paid for. *See* Record Document 376, Exhibit 15 at p. 238. The question and answer between Robert Piper and Binion proceeded as follows:

> Q. I like the word snafu, and the snafu was not caused by you, was, Mr. Binion?
>
> A. No.

> Q. Because you didn't expect for [Plaintiffs] to come and pay for a meal at the Horseshoe?
>
> A. No.

Id. at 238-239. Based on this deposition testimony, Defendants argue that summary judgment is appropriate because if Binion was not even aware of any "snafus" with the Pipers' comp privileges after April 21, 1999, then he could not have broken his comp privileges agreement with the Pipers. *See* Record Document 314-2 at 43.

The Piper Plaintiffs contend that even though Binion denied knowing of the "snafus," he was aware of the Pipers' troubles regarding post-April 21, 1999 comp privileges because he was informed of such troubles by Robert Piper. *See* Record Document 376-1 at 74. The Piper Plaintiffs contend that Robert Piper's comp privileges were reinstated at one point only to be discontinued again in direct violation of his agreement with Binion. *See id.* In light of these facts, the Piper Plaintiffs argue that summary judgment is inappropriate. *See id.* at 74-75.

There appears to be a genuine issue of material fact regarding Binion's awareness of the Pipers' problems concerning comp privileges. In his deposition, Binion stated that he was not aware of the comp problems. *See* Record Document 376, Exhibit 15 at p. 238. Yet, Binion then goes on to testify that he knew Robert Piper had said there were some problems regarding comps. *See id.* The Court is unsure whether

Binion's testimony means he learned of the problems relating to comp privileges from Robert Piper while the problems were ongoing or if he learned of the problems after the fact, *i.e.,* during the course of the instant litigation. Further, the Court is faced with record evidence that Robert Piper, personally, made Binion aware of the problems concerning his comps. Such factual confusion surrounding the issue of awareness is material, as Binion's awareness of any problems regarding comp privileges may affect his potential liability for violation of the handshake agreement regarding comp privileges in place between Binion and the Piper Plaintiffs. Accordingly, summary judgment on the issue of revocation of comp privileges must be denied and the Piper Plaintiffs' claim for revocation of comp privileges remains.

C. Defendant Horseshoe Entertainment, L.P.'s Counterclaim Against Robin.

In its counterclaim against Robin, Horseshoe Entertainment, L.P. asked this Court to award him $550,000, plus interest from April 15, 2003 and attorneys fees. Such claim is based on provisions contained in Paragraph 2 of Robin's Buyout Agreement, which states that Robin owes Horseshoe Entertainment, L.P. $550,000 and that such amount shall be paid on or before April 15, 2003. *See* Record Document 314, Exhibit 3, ¶ 2. To date, Robin has made no payment on the $550,000 debt.

On April 7, 2003, Kirk Saylor, CFO of Horseshoe gaming Holding Corporation, wrote to Robin and reminded him that under Paragraph 2 of the Buyout Agreement, he was required to remit the balance owed of $550,000 on or before April 15, 2003. *See id.*, Exhibit 6, Tab R (Exhibit 80). Even in light of this amicable demand, Robin failed to pay the amount of the note. In his deposition, Robin admitted that he had not paid the $550,000, stating:

> Q. Did you – did you ever pay the $550,000 called for in that letter?
>
> A. No, sir.
>
> Q. Why not?
>
> A. Because I – I – this $550,000 was a draft from an agreement that we were – that I was going to be paid in the future, so, I – I was going to – we were going to – I was going to settle in. He owed me money, I owed him money.
>
> Q. Who is he?
>
> A. Mr. Binion.
>
> Q. Did you ever discuss that with Mr. Binion?
>
> A. No, sir. We was at a point where we wasn't discussing things.

Id., Exhibit 5 at p. 148. Based on this record evidence, Defendants argue that there is no genuine issue of material fact with respect to the $550,000 debt and that Binion is entitled to summary judgment in his

favor, and against Robin, in the amount of $550,000.00, plus interest from April 15, 2003, attorneys fees and all costs.

Conversely, Robin argues that "there is a question of fact concerning whether this amount [the $550,000 debt] is even owed because Jack Binion has, as a matter of law, breached the agreement under the Participation Clause [the Most Favored Nations Clause]." Record Document 369 at 21. According to Robin, his obligation to pay $550,000 to Binion was only an obligation to pay a "draw" on future payments owed to him under the Most Favored Nations Clause. *Id.* No provision in the written agreement characterized the obligation as a "draw." It is in fact a debt for a specific sum owed by Robin. Robin contends that Binion has "breached the very heart of the consideration given for" the Buyout Agreement and that he cannot ask for one term of the contract to be enforced to the exclusion of others. *Id.* Further, Robin maintains that under Louisiana Civil Code Article 2015,[18] that the April 21, 1999 Robin Buyout Agreement,

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[18] Article 2015 states:

> Upon a party's failure to perform, the other may serve him a notice to perform within a certain time, with a warning that, unless performance is rendered within that time, the contract shall be deemed dissolved. The time allowed for that purpose must be reasonable according to the circumstances.
>
> The notice to perform is subject to the requirements governing a putting of the obligor in default and, for the recovery of damages for delay, shall have the same effect as a putting of the obligor in default.

which includes Robin's obligation to pay $550,000, has been dissolved due to Binion's failure to pay under the Most Favored Nations Clause of the Agreement. *See id.* at 22.

The Court finds Robin's arguments unpersuasive. The Court has previously ruled in the instant Memorandum Ruling that Plaintiffs' claims of fraud fail and that Binion did not violate, and that no Participation Payments are due under, the Most Favored Nations Clause, as the contract of sale between Harrah's and Horseshoe occurred in July 2004, a date well outside of the five year window in the Most Favored Nations Clause. Further, the Court notes that Paragraph 2 of Robin's Buyout Agreement, which recites both forgiveness of certain loans and the $550,000 indebtedness, makes no internal reference to the Participation Clause/Most Favored Nations Clause. Rather, Paragraph 2 states that the $550,000 will become due and payable on April 15, 2003, over a year before the deadline for triggering the Participation Clause. Simply put, Robin's "draw" argument fails because this Court has held that Defendants owe no Participation Payments to Plaintiffs under the Most Favored Nations Clause. Likewise, Robin's reliance on Article 2015 is misplaced because Binion did not fail to perform under the Most Favored Nations Clause, rather the Harrah's/Horseshoe sale occurred outside of the five year window of the Most Favored Nations Clause.

The Court finds no genuine issue of material fact regarding Robin's $550,000 indebtedness, which is clearly past due and payable. Accordingly, Horseshoe

Entertainment, L.P. is entitled to summary judgment in its favor, and against Robin, in the amount of $550,000 plus interest, attorneys' fees and costs.

D. Late Named, Unserved Defendants.

In their Motion for Summary Judgment, Defendants note that while Plaintiffs sued Horseshoe Gaming, LLC and Horseshoe Gaming, Inc. in their second amended complaints, neither has ever been served. *See* Record Document 314-2 at 44. Therefore, pursuant to Local Rule 41.3W,[19] Defendants ask that those defendants be dismissed from the instant action. *See id.*

The Piper Plaintiffs, the only Plaintiffs to respond to Defendants' request for dismissal, maintain that Horseshoe Gaming, LLC and Horseshoe Gaming, Inc. are shell corporations of Horseshoe Entertainment. *See* Record Document 376 at 75. Therefore, they argue that Binion is the principal agent for each of these entities and that service as to the original defendants is valid service upon the shell corporations. *See id.*

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[19] LR 41.3 W states, in pertinent part:

> A civil action may be dismissed by the clerk of court or any judge of this court for lack of prosecution as follows:
>
> A. Where no service of process has been made within 120 days after filing of the complaint.

The Court disagrees with the Piper Plaintiffs' argument, for which no citation was provided. Accordingly, because neither Horseshoe Gaming, LLC nor Horseshoe Gaming, Inc. have been served, both entities are dismissed pursuant to Local Rule 41.3W.

III. CONCLUSION.

Based on the foregoing, the Motion for Summary Judgment (Record Document 314) filed by Defendants, Jack B. Binion, Horseshoe Entertainment, L.P., Horseshoe Gaming Holding Corporation, and New Gaming Capital Partnership, Inc., be and is hereby **granted in part** and **denied in part.** All of Plaintiffs' claims, except the Piper Plaintiffs' claim for revocation of comp privileges, are **dismissed.** As to the counterclaim in this matter, the Court enters judgment in favor of Horseshoe Entertainment, L.P., and against August "Duke" Robin, in the amount of $550,000 plus interest, attorneys' fees and costs. Finally, pursuant to Local Rule 41.3W, Horseshoe Gaming, LLC and Horseshoe Gaming, Inc. are dismissed.

THUS DONE AND SIGNED in Shreveport, Louisiana, this 4th day of January, 2007.

/s/ S. Maurice Hicks, Jr.
S. MAURICE HICKS, JR.
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

AUGUST ROBIN, ET AL.	CIVIL ACTION NO. 04-1695
VERSUS	
JACK B. BINION, ET AL.	JUDGE S. MAURICE HICKS, JR.
	MAGISTRATE JUDGE HAYES

ORDER

(Filed Jan. 4, 2007)

Based on the foregoing Memorandum Ruling,

IT IS ORDERED that the Motion for Summary Judgment (Record Document 314) filed by Defendants, Jack B. Binion, Horseshoe Entertainment, L.P., Horseshoe Gaming Holding Corporation, and New Gaming Capital Partnership, Inc., be and is hereby **GRANTED IN PART** and **DENIED IN PART**.

IT IS FURTHER ORDERED that all of Plaintiffs' claims, except the Piper Plaintiffs' claim for revocation of comp privileges, are **DISMISSED**.

IT IS FURTHER ORDERED that as to the counterclaim in the above-captioned matter, judgment in favor of Horseshoe Entertainment, L.P., and against August "Duke" Robin, is entered in the amount of $550,000 plus interest, attorneys' fees and costs.

IT IS FURTHER ORDERED that pursuant to Local Rule 41.3W, Horseshoe Gaming, LLC and Horseshoe Gaming, Inc. are **DISMISSED**.

THUS DONE AND SIGNED in Shreveport, Louisiana, this 4th day of January, 2007.

/s/ S. Maurice Hicks, Jr.
S. MAURICE HICKS, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-30151

AUGUST ROBIN; ROBERT PIPER; CASSANDRA PIPER; WENDELL PIPER

Plaintiffs-Appellants

v.

JACK B BINION; HORSESHOE ENTERTAINMENT; HORSESHOE GAMING HOLDING CORP; NEW GAMING CAPITAL PARTNERSHIP

Defendants-Appellees

Consolidated With
Case No. 07-30156

AUGUST ROBIN

Plaintiff-Appellant

v.

JACK B BINION; HORSESHOE ENTERTAINMENT; HORSESHOE GAMING HOLDING CORP; NEW GAMING CAPITAL PARTNERSHIP

Defendant-Appellees

Consolidated With
Case No. 07-30159

ROBERT PIPER; CASSANDRA PIPER; WENDELL PIPER

Plaintiffs-Appellants

v.

JACK B BINION; HORSESHOE ENTERTAINMENT; HORSESHOE GAMING HOLDING CORP; NEW GAMING CAPITAL PARTNERSHIP

Defendants-Appellees

Appeals from the United States District Court
for the Western District of Louisiana, Shreveport

ON PETITION FOR REHEARING

(Filed Apr. 23, 2008)

Before JOLLY, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition of appellant, August Robin, for rehearing is DENIED

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge